

Decision No. C17-0750

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 15A-0589E

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IN THE MATTER OF THE APPLICATION OF THE CITY OF BOULDER, COLORADO FOR APPROVAL OF THE PROPOSED TRANSFER OF ASSETS FROM PUBLIC SERVICE COMPANY OF COLORADO TO THE CITY AND ASSOCIATED AUTHORIZATIONS AND RELIEF.

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**DECISION GRANTING, IN PART AND WITH  
CONDITIONS, AND DENYING, IN PART,  
THIRD SUPPLEMENTAL VERIFIED APPLICATION**

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Mailed Date: September 14, 2017  
Adopted Date: August 30, 2017

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**I. BY THE COMMISSION**

**A. Statement**

1. The City of Boulder (Boulder or the City) has conditionally authorized the formation of a municipal electric utility, and the Boulder City Council has voted to pursue the acquisition of the electric utility assets in Boulder from Public Service Company of Colorado (Public Service or the Company). There are approximately 52,500 Public Service customers in Boulder that the City seeks to separate from Public Service’s service area. Boulder states that it is not seeking to provide service to any customers located outside of the Boulder city limits. Boulder, however, is not seeking to provide service to all customers within the city. Because of

the cost of serving two City-owned facilities within the city, Boulder has requested that Public Service continue to serve those facilities.

2. On May 12, 2017, Boulder filed its Third Supplemental Verified Application (Application) seeking approval of the transfer of certain assets from Public Service to the City. Boulder also seeks associated authorizations and relief as set forth in the Application. Boulder filed Direct Testimony and Exhibits of six witnesses in support of the Application.

3. Boulder states that the Colorado Public Utility Commission's (Commission or PUC) task in this Proceeding is to determine how Public Service's system should be assigned, divided, and jointly used and to ensure that the transfer of property required for Boulder to municipalize will not impact the effectiveness, reliability, and safety of Public Service's system after separation.

4. Now being fully advised in this matter, the Commission grants, in part and with conditions, and denies, in part, the Application. Our decision satisfies the requirements stemming from the Boulder District Court in Order Re: Judicial Review of the Colorado Public Utilities Commission Decision, *City of Boulder v. Pub. Utils. Comm'n*, Case No. 14CV30047 (Boulder Dist. Ct., January 14, 2015)(Boulder District Court Decision). Namely, our decision determines—to the extent necessary at this time—how Public Service's facilities should be assigned, divided, or jointly used to protect Public Service's electric distribution system's effectiveness, reliability, and safety. Our decision to grant conditionally a portion of the Application also reflects two primary considerations: first, we seek to preserve Public Service's ability to serve its customers during separation and post-separation; and second, we seek to protect Public Service's ratepayers from being responsible for payment of any municipalization and separation costs that Boulder should pay.

5. We approve the designation of certain assets for transfer from Public Service to Boulder, subject to Boulder demonstrating compliance with three conditions as discussed in detail below. The specific assets designated for potential transfer are located outside of the substations that Public Service presently uses to serve its retail electric customers in the Boulder area. In order to secure final approval of the designation of these assets for transfer, Boulder must take the following actions: (1) file an agreement reached between Boulder and Public Service that provides Public Service permanent non-exclusive easements and other necessary real property rights for the location of its electric facilities within Boulder's city limits that are necessary for Public Service to provide service to its customers after separation; (2) correct the errors and omissions from the list of assets for transfer outside of the substations and resubmit the revised list of assets for final approval; and (3) file an agreement (or multiple agreements) between Boulder and Public Service that address(es) the payment by Boulder to Public Service of the costs incurred by Public Service to effectuate municipalization and the separation of Public Service's system into two separate systems.

6. We find that it is premature to designate any facilities inside the substations for potential transfer to Boulder from Public Service. We conclude that it is reasonable for Public Service and Boulder to rely upon the normal load interconnection request process that is available to Boulder as a prospective transmission customer of Public Service. We expect the transmission load interconnection process will establish the required configurations and ownership arrangements within the substations without requiring further action by the Commission before Boulder proceeds to condemnation.

7. Further, we deny Boulder's other requests as set forth in its Application, consistent with the discussion below.

8. We direct Public Service to assist Boulder in good faith in the City's efforts to satisfy the conditions set forth in this Decision for securing final Commission approval of the designation of assets for transfer outside of the substations. We also direct Public Service to work with Boulder in good faith pursuant to the transmission load interconnection process under the Company's Open Access Transmission Tariff (OATT), consistent with the discussion below.

9. We direct Public Service to serve customers within Boulder city limits until the time when Boulder begins to operate its municipal electric utility (*i.e.*, the Cut-Over Date). We further direct Public Service to account for the costs it incurs associated with Boulder's municipalization and separation efforts for the purpose of review of such costs in future rate cases and associated proceedings.

10. This Proceeding may conclude with a final decision designating the assets for transfer (those outside of the substations) from Boulder to Public Service upon the Commission's satisfaction that Boulder has complied with the three conditions set forth in this Decision. In the future, Boulder and Public Service shall file an application in a separate proceeding for final approval of the transfer of assets, pursuant to § 40-5-105, C.R.S., prior to when Boulder begins to operate its municipal electric utility.

**B. Third Supplemental Verified Application**

11. Boulder asks the Commission to approve a proposed separation of the electric distribution system to permit, on the one hand, the City to provide electric service to its future customers within the city limits with City-owned facilities; and, on the other hand, Public Service to provide electric service to the Company's customers in unincorporated Boulder County. The specific assets that Boulder seeks to acquire, according to the Application, were identified during the development of a "Separation Plan."

12. Boulder asks the Commission to approve the transfer of Public Service's assets associated with the distribution of electricity that are needed for Boulder to own and operate a municipal electric utility. Boulder also requests that the Commission approve the proposed planning level configuration of the Separation Plan that identifies the construction of new facilities and reconfiguration of the existing facilities that will be necessary for the existing system to operate as two separate systems. Specifically, Boulder requests that the Commission find that the Separation Plan will, if implemented as proposed by the City, result in a system for Public Service that is as effective, reliable, and safe as Public Service's current system.

### 1. Proposed Assets for Transfer

13. Boulder's Application filing, including Direct Testimony and Exhibits, describes in detail the proposed assets for transfer.

14. Boulder separates the assets into two categories: (1) the assets for approval that are *inside* the six substations that Public Service currently uses to provide retail electric service to customers within Boulder (identified as Substations A, B, C, D, E, and F),<sup>1</sup> and (2) the assets for transfer that are *outside* of those substations.<sup>2</sup>

15. The assets for transfer *outside* the substations include the following: the electric distribution property, plant, and equipment used, in whole or in part, to serve electric customers within Boulder, whether located within or outside the city limits, including: overhead and underground distribution lines; distribution transformers (both pole and pad mount); overhead and underground secondary and service conductors; fiber optic and other communications

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<sup>1</sup> See Hearing Exhibits 202 and 202A, Nickell Answer, Attachment CSN-1.

<sup>2</sup> See, e.g., Hearing Exhibits 103 and 103A, Ghidossi Direct, Attachment TAG 5, Technical Volume Part I, p. 11.

equipment associated with the distribution system; customer meters and other equipment; easements; and associated property rights for the electric distribution system. The assets for transfer also include streetlights and traffic signal lights owned by Public Service and located within the city limits.

16. The assets for transfer *inside* the substations include protective equipment on the high voltage side of transformers (including relaying, communications, and control equipment), power transformers, distribution switchgear, and easements.

17. Boulder states that it is not seeking authority to transfer any other assets, including any of Public Service's generation assets, transmission assets, the Company's Certificate of Public Convenience and Necessity (CPCN), goodwill, consulting agreements, brands, advertising, or employees.

## **2. Boulder's Proposed Separation Plan**

18. Boulder's proposed Separation Plan consists of: (1) two separation models—a Synergi version (using proprietary engineering software) and a Geographic Information System (GIS) version; (2) the testimonies of two engineers hired by Boulder to provide expert testimony in this Proceeding—Mr. Thomas A. Ghidossi and Mr. Steven D. Catanach; and (3) certain attachments to their pre-filed testimony. Boulder argues that its proposed Separation Plan is the result of extensive engineering design and testing that is sufficient to prove that it will ensure Public Service has a system after separation that is at least as effective, reliable, and safe to operate as the existing system.

19. Boulder states that its proposed Separation Plan is presented at a planning level of engineering, which, according to the City, is a mid-level design having more detail than conceptual design, but less detail than a final design. Boulder argues that this planning level

of engineering provides: (1) sufficient detail to guide long-term decisions and perform cost estimates in the 30 percent contingency range; (2) general construction and modification descriptions; (3) preliminary routes and configurations; and (4) performance analysis indicating that construction and modifications are intended to meet Public Service's criteria. According to Boulder, the Separation Plan may serve as a blueprint for the design of the construction phase of the work by combining known, existing facilities with facilities to be constructed in order to maintain electrical continuity and system reliability.

20. Boulder's proposed Separation Plan is primarily the result of its planning of a "No Distribution Interconnection" scenario (NDI Plan), where feeders would be extended, in some cases across the City, to provide a tie between substation transformers that are owned and operated by each serving utility: Public Service and Boulder. Boulder explains that the result is essentially a separate distribution loop for Public Service that is being created around the City to allow Public Service to have necessary back-up sources, as well as new ties. In turn, Boulder will have the necessary back-up sources it needs on the Boulder system in order for it to provide service within the City.

21. The NDI Plan applies to all "study areas" in Boulder, with the exception of Area 1.<sup>3</sup> Certain out-of-city customers in Area 1 would follow an alternative "Emergency Back-up Plan" (EB Plan). Boulder explains that an EB Plan would allow Boulder's system to normally operate independently from Public Service's system. However, during an outage or during maintenance, construction, or other activities requiring back-up, one utility will provide back-up to the other from key interconnection points on the system. Boulder estimates that an NDI Plan

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<sup>3</sup> There are ten study areas depicted in Hearing Exhibits 105, 105A, and 105B, Catanach Direct, Attachment SDC-2, p. 1.

for all of Area 1 would cost approximately \$1 million more than an EB Plan for the eight out-of-City customers.

22. Notwithstanding the proposed separation of the two systems, Boulder proposes that Public Service continue to serve two city-owned parcels within its city limits: the facilities at Boulder Reservoir and the Open Space and Mountain Parks Department facilities located at Cherryvale Road and South Boulder Road, respectively.

23. Boulder acknowledges that Public Service developed the existing distribution system without regard to the City's municipal boundaries, recognizing that Public Service designed its system to serve all of the electric customers within its designated service territory. Boulder also acknowledges that throughout the existing system, individual feeders routinely serve customers both inside and outside the city limits and often cross the boundaries of the City several times.

24. Boulder states that the implementation of the Separation Plan will entail the addition of new substation transformers and the construction of new backbone feeders that are tied together to provide back-up. Boulder estimates that the construction and reconfiguration work in the Separation Plan will take at least three years to complete.

### **3. Four-Phase Proceeding and Other Regulatory and Court Activities**

25. Boulder proposes that this Proceeding be divided into four phases. Boulder's plan is that itself and Public Service would both undertake various activities between the phases. Further, Boulder and Public Service would engage in other proceedings related to municipalization, including potentially, a condemnation proceeding to acquire the assets needed to operate a municipal electric utility as well as other proceedings before this Commission

and the Federal Energy Regulatory Commission (FERC) to address electric generation and generation-related stranded costs.

26. Boulder argues that the Commission will retain jurisdiction over all matters through all four of the City's proposed phases for this Proceeding, because Public Service will continue to own the distribution system in Boulder and because Public Service will continue to have a CPCN to provide retail electric service in the area. Boulder explains that Public Service would operate, maintain, and improve the system in Boulder until the separation of the system is complete. Boulder argues this approach would eliminate any impact to customers in the interim period and would permit Public Service to continue to receive the benefits and obligations of asset ownership within the Boulder city limits. In addition, Boulder proposes that Public Service, using a third-party contractor in coordination with the City, would construct all new facilities and engage in any reconfiguration necessary to separate the systems, in conformance with detailed design drawings and specifications as approved by the Commission. Boulder also proposes that Public Service finance this construction and reconfiguration work, where all costs associated with these activities would be accounted for in a "regulatory asset," subject to various Commission reviews and prudence determinations, for repayment by Boulder after the implementation of the Separation Plan is complete.

27. In order to ensure Commission jurisdiction over all matters in this Proceeding, Boulder proposes that Public Service enter an agreement with Boulder delaying issuance of a Rule and Order in the district court condemnation proceeding. Specifically, the agreement would provide the following: (1) the payment of the condemnation court's valuation award would be deferred until after construction of the Separation Plan is complete; (2) there would be no interest

paid on such deferred amounts; and (3) the entry of the Rule and Order would be delayed until the systems are fully separated.

28. Phase 1 of this Proceeding is intended to support Boulder's attempt to acquire the assets from Public Service by negotiation, or if unsuccessful, to file a condemnation case to acquire the assets approved by the Commission for transfer. Phase 2 is centered on a "Go/No-Go Decision" when Boulder will determine, prior to the beginning of any construction and reconfiguration of the system, whether it can move forward with municipalization. The final two phases culminate in the "Cut-Over Date" which is when Boulder begins to operate its municipal electric utility.

29. In this Phase 1, the City is asking the Commission to approve: (1) the transfer of the assets Boulder wishes to acquire from Public Service so the City may move forward to condemnation; and (2) the Separation Plan. Boulder states that once the Commission approves the transfer of assets, Boulder can move to condemnation in order to acquire the assets.

30. Boulder proposes that after the Commission approves the Separation Plan, Public Service, in consultation with Boulder's engineers, would contract with third-party engineers to complete the final design for the Separation Plan, solicit bids for the necessary construction work, and develop an estimated timeline for the separation.

31. Boulder then proposes to return to the Commission in Phase 2, when it will seek Commission approval of: (1) detailed design drawings and specifications consistent with a Commission-approved Separation Plan; (2) the bid for the construction and reconfiguration work necessary to implement the Separation Plan; and (3) an estimated construction timeline. Boulder states that Phase 2 would be concurrent with a condemnation proceeding in Boulder District Court.

32. At the conclusion of Phase 2 and the conclusion of the condemnation proceeding, but prior to the start of construction and reconfiguration of the systems, Boulder proposes that it would determine whether it could proceed with municipalization. The Go/No-Go Decision would be premised on the cost of acquisition, separation, and other start-up costs.

33. Should Boulder decide to continue with municipalization of the electric distribution system, it would move into Phase 3 of this Proceeding. Boulder proposes that Public Service's third-party contractor, consistent with the Separation Plan, would construct new facilities and reconfigure existing facilities during this phase. Boulder further proposes that costs incurred during this time would be tracked in a regulatory asset. Phase 3 would also entail Commission approval of Boulder's "Cut-Over Plan." During Phase 3, Boulder anticipates a need to obtain information necessary to operate an electric distribution system and states that it will require a waiver of certain of the Commission's Data Privacy Rules.

34. Boulder proposes to complete this Proceeding in Phase 4, in which Boulder would make a compliance filing, notifying the Commission that the electric distribution system has successfully been divided into two independent systems and containing the final total costs incurred in separation and reconfiguration of the system, plus interest equal to Public Service's weighted average cost of capital. After Boulder has paid the condemnation award and the costs tracked through the regulatory asset, the City would receive the court title and possession of the electric distribution system assets and the system would be separated for independent operations at the Cut-Over Date.

**C. Procedural History**

35. The Application is the third iteration of Boulder's request for approval of the transfer of assets and associated orders and directives from the Commission related to its municipalization efforts.

36. On July 7, 2015, Boulder filed a Verified Application (First Application) which caused this Proceeding to be opened. Boulder initially sought various approvals from the Commission to acquire facilities from Public Service that would serve customers both within Boulder city limits and outside the city's boundaries. Boulder filed the application with Direct Testimony and Exhibits of nine witnesses.

37. The Parties to this Proceeding were established through Decision Nos. C15-0888-I, issued on August 14, 2015, and C15-0946-I, issued on August 28, 2015: Boulder; Public Service; Staff of the Colorado Public Utilities Commission (Staff); IBM, Inc. (IBM); the Colorado Office of Consumer Counsel (OCC); Tri-State Generation and Transmission Association, Inc. (Tri-State); Climax Molybdenum Company (Climax); CF&I Steel, L.P., doing business as Evraz Rocky Mountain Steel (Evraz); Boulder Chamber of Commerce; University of Colorado Boulder (CU-Boulder); and Leave BoCo Out. Poudre Valley Rural Electric Association, Inc. (PVREA) and United Power, Inc. were granted *amicus curiae* status.

38. Through Decision No. C15-1360-I, issued on December 30, 2015, the Commission dismissed the portions of the First Application requesting acquisition of facilities used exclusively to serve Public Service customers outside of the Boulder city limits. The Commission also granted Boulder's request to conduct discovery and to supplement its application in a future filing.

39. Through Decision No. C16-0336-I, issued on April 19, 2016, the Commission approved modified discovery procedures in order to allow Boulder to obtain information necessary to file a second supplemental application.

40. On September 28, 2016, Boulder filed its Second Supplemental Verified Application (Second Supplement). Boulder filed the Second Supplement with Direct Testimony and Exhibits of eight witnesses.

41. The Commission deemed the Second Supplement complete for purposes of § 40-6-109.5, C.R.S., through Decision No. C16-1053-I, issued on November 17, 2016. That decision also required Boulder to provide notice of the Second Supplement to its residents and residents of enclaves outside of the Boulder city limits who may be affected by the Second Supplement.

42. Through Decision No. C16-1148-I, issued on December 15, 2016, the Commission established a procedural schedule for the consideration of the Second Supplement. An evidentiary hearing was scheduled to begin on April 26, 2017 and to continue through May 5, 2017. The deadline for a decision on the Second Supplement was established as June 15, 2017 pursuant to § 40-6-109.5(1), C.R.S.

43. Through Decision No. C17-0052-I, issued on January 20, 2017, the Commission granted the intervention filed by Twin Lakes Action Group (TLAG).

44. On January 27, 2017, through Decision No. C17-0084-I, the Commission required that the parties file legal briefs to certain questions no later than February 17, 2017, and also required that the parties confer and file a joint statement of the remaining legal and factual issues in dispute no later than March 3, 2017.

45. Through Decision No. C17-0131-I, issued on February 14, 2017, the Commission granted the intervention filed by the International Brotherhood of Electrical Workers, Local No. 111 (Local 111).

46. On February 17, 2017, Answer Testimony and Exhibits were filed on behalf of Public Service (seven witnesses), IBM (three witnesses), Staff (one witness), the OCC (one witness), and Local 111 (one witness). All of the intervening parties opposed approval of all or parts of the Second Supplement.

47. Legal briefs were filed on February 17, 2017 by Boulder, Public Service, Staff, IBM, the OCC, and TLAG, in accordance with Decision No. C17-0084-I.

48. On March 27, 2017, Boulder filed a Motion to Withdraw a Portion of its Application and Direct Testimony in Support Thereof (Motion to Withdraw).

49. On March 30, 2017, Boulder filed Rebuttal Testimony and Exhibits of six witnesses. Also on March 30, 2017, Cross-Answer Testimony and Exhibits were filed by Public Service (three witnesses), Staff (one witness), and CU-Boulder (one witness).

50. The Commission convened a prehearing conference in this matter on April 19, 2017.

51. In Decision No. C17-0318-I, adopted at the prehearing conference and issued on April 24, 2017, the Commission found that the Motion to Withdraw and the City's Rebuttal Testimony and Exhibits had altered the relief Boulder seeks in this Proceeding substantially enough to potentially prejudice intervening parties, should the hearing commence as scheduled on April 26, 2017. The Commission, therefore, vacated the remaining procedural schedule, including the evidentiary hearings scheduled to begin on April 26, 2017, and ordered Boulder to file a Third Supplemental Verified Application to ensure that intervening parties had adequate

clarity as to the relief sought by Boulder. The Commission extended the deadline for a final decision an additional 90 days, or until September 13, 2017, pursuant to § 40-6-109.5(4), C.R.S. Determining that the pre-filed testimony submitted before the prehearing conference would not be part of the evidentiary record at hearing, the Commission rescheduled the hearing to begin on July 26, 2017.

52. On May 12, 2017, Boulder filed its Third Application which is the Application that is addressed by this Decision. Boulder filed Direct Testimony and Exhibits of six witnesses in support of the Application, including: (1) Heather Bailey, Executive Director of Energy Strategy and Electric Utility Development for the City of Boulder (Hearing Exhibit 101); (2) Thomas A. Ghidossi, P.E., of Exponential Engineering Company (Hearing Exhibits 103 and 103A); (3) Steven D. Catanach, P.E. (Hearing Exhibits 105, 105A, and 105B); (4) Robert Eiche, Chief Financial Advisor to the City of Boulder (Hearing Exhibit 111); (5) Christopher J. Meschuk, Senior Planner for the City of Boulder (Hearing Exhibit 100); and (6) Kenneth K. Skogg, an attorney experienced in commercial litigation with an emphasis on disputes based on or related to real estate (Hearing Exhibit 107). These are the same six witnesses that filed Rebuttal Testimony and Exhibits addressing the Second Supplement.

53. On June 16, 2017, the following intervening parties filed Answer Testimony and Exhibits: Public Service (eight witnesses), IBM (three witnesses), Staff (two witnesses), the OCC (two witnesses), and Tri-State (one witness).

54. Public Service submitted the Answer Testimony and Exhibits of the following: (1) David L. Eves, President of Public Service Company of Colorado (Hearing Exhibit 200); (2) Chad S. Nickell, Manager of Distribution System Planning and Strategy of Xcel Energy Services Inc. (Hearing Exhibits 202 and 202A); (3) Helen C. Atkeson, an attorney experienced in

public finance (Hearing Exhibit 208); (4) Deborah A. Blair, Director, Revenue Analysis of Xcel Energy Services Inc. (Hearing Exhibit 209); (5) Hubert A. Farbes, Jr., a real estate and construction litigator (Hearing Exhibit 212); (6) Leslie Fields, an attorney whose practice focuses almost exclusively on eminent domain matters (Hearing Exhibit 214); (7) Lawrence J. Gelbien, a consultant from Navigant Consulting and a former Vice President of Engineering for an electric utility (Hearing Exhibit 205); and (8) Betty L. Mirzayi, Manager Transmission Planning West for Xcel Energy Services Inc. (Hearing Exhibit 211).

55. IBM submitted the Answer Testimony and Exhibits of: (1) Leo M. Ladaga, Senior Service Delivery Manager—US (Hearing Exhibits 500 and 500A); (2) Brody O. Wilson, P.E., Site Energy Coordinator at IBM's Boulder campus (Hearing Exhibits 501 and 501A); and (3) Eugene Shlatz, a Director in Navigant Consulting's Energy Practice (Hearing Exhibits 503 and 503A).

56. Staff submitted the Answer Testimony and Exhibits of: (1) Gene L. Camp, P.E., Chief Engineer (Hearing Exhibit 302); and (2) Sharon Podein, P.E., Senior Engineer (Hearing Exhibit 300).

57. The OCC submitted the Answer Testimony and Exhibits of: (1) Ronald Fernandez, Financial Analyst (Hearing Exhibit 400); and (2) Chris Neil, Rate/Financial Analyst (Hearing Exhibit 402).

58. Tri-State submitted the Answer Testimony and Exhibits of Grant D. Lehman, Senior Manager, Transmission Engineering and Construction, Tri-State Generation and Transmission Association, Inc. (Hearing Exhibits 600 and 600A).

59. On July 10, 2017, Boulder filed Rebuttal Testimony and Exhibits of the same six witnesses that filed Direct Testimony and Exhibits: Bailey (Hearing Exhibit 102), Catanach

(Hearing Exhibits 106 and 106A), Eichem (Hearing Exhibit 112), Ghidossi (Hearing Exhibits 104 and 104A), Meschuk (Hearing Exhibit 110), and Skogg (Hearing Exhibit 108).

60. Cross-Answer Testimony and Exhibits were filed by Public Service (six witnesses), Staff (two witnesses), IBM (two witnesses), the OCC (two witnesses), and Tri-State on July 10, 2017.

61. Public Service submitted testimony of Mr. Eves (Hearing Exhibit 201), Ms. Blair (Hearing Exhibit 210), Mr. Farbes (Hearing Exhibit 213), Ms. Fields (Hearing Exhibit 215), Mr. Gelbien (Hearing Exhibit 206), and Mr. Nickell (Hearing Exhibit 203), as well as Mr. John D. Lee, Senior Director, Electric Distribution Engineering for Xcel Energy Services Inc. (Hearing Exhibit 207).

62. Staff filed testimony of Mr. Camp (Hearing Exhibit 303) and Ms. Podein (Hearing Exhibit 301).

63. The OCC filed testimony of Mr. Fernandez (Hearing Exhibit 401) and Mr. Neil (Hearing Exhibit 403). Tri-State filed testimony of Mr. Lehman (Hearing Exhibit 601).

64. On July 21, 2017, Public Service filed Surrebuttal Testimony directed at Boulder's Rebuttal Testimony and Exhibits. Testimony was submitted by Fields (Hearing Exhibit 216) and Nickell (Hearing Exhibit 204).

65. The Commission conducted a prehearing conference on July 21, 2017. At the prehearing conference, the parties agreed that Boulder could present oral testimony in response to the issues raised in Public Service's Surrebuttal Testimony.

66. The Commission conducted a nine-day evidentiary hearing on the Application beginning on July 26, 2016 and extending through August 7, 2017. Boulder witness Ghidossi was permitted to present oral testimony in response to the Surrebuttal Testimony of Public

Service witness Nickell,<sup>4</sup> and Boulder witness Skogg was permitted to present oral testimony in response to the Surrebuttal Testimony of Public Service witness Fields.<sup>5</sup>

67. During the course of the hearing, Hearing Exhibits 100 through 112, 200 through 216, 300 through 303, 400 through 403, 500 through 504, and 600 through 601 were offered and admitted into the evidentiary record in this Proceeding. Hearing Exhibit 100 is the Application while the remainder of the Hearing Exhibits correspond to the pre-filed Direct Testimony, Answer Testimony, Rebuttal Testimony, Cross-Answer Testimony, and Surrebuttal Testimony. Hearing Exhibits 700 through 708, 710 through 740, 742 through 743, 745 through 761, 764 through 769, 771, and 773 were offered and admitted as evidence during either direct examination, cross-examination, or redirect examination of the witnesses. Hearing Exhibit 772 was marked for identification, offered, but then withdrawn. Hearing Exhibits 709, 741, 744, 762, 763, and 770 were not admitted.

68. On August 15, 2017, final statements of position were filed by Boulder, Public Service, Staff, IBM, OCC, CU-Boulder, Climax, Tri-State, and Evraz.

69. Numerous public comments were submitted to the Commission during the course of this Proceeding.

## **D. Overview of the Positions of the Intervening Parties**

### **1. Public Service**

70. Public Service rejects Boulder's position that its Separation Plan is approvable at this time, and argues that the Commission must have substantially more information than the engineering analyses that Boulder provided in order to be in a position to render a decision as to

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<sup>4</sup> Hearing Transcript, July 27, 2017 at 103-147.

<sup>5</sup> Hearing Transcript, July 31, 2017 at 11-24.

whether safety, reliability, and effectiveness will be preserved and as to whether no costs of municipalization will be shifted to Public Service and its remaining customers.

71. Public Service further argues that Boulder cannot engage in the mandatory, pre-filing good faith negotiations for filing a condemnation action based upon Boulder's proposed Separation Plan as it currently exists.

72. Public Service asserts that Boulder's requests for relief must be within the scope of the Commission's jurisdiction to grant, but that most elements of the Separation Plan are not within that scope. Public Service contends, for example, that the Commission does not have the authority to require Public Service to engage in the following: (1) finance the entire separation and construction; (2) construct facilities for Boulder; (3) construct facilities for Public Service and to separate existing facilities on Boulder's terms and conditions; (4) waive certain rights which would otherwise exist in condemnation; and (5) "negotiate" up to a dozen or more agreements with Boulder. Public Service argues that Boulder's financing and construction proposals essentially are requests that the Commission order Public Service to provide lending services and general contractor services to Boulder. Public Service further argues that while the Company could voluntarily agree with Boulder to enter various agreements, it cannot be compelled to enter into such contracts.

73. Public Service also contends that Boulder must meet its burden of proof in this Proceeding, not in later phases, to demonstrate that Boulder's proposed Separation Plan will enable Public Service to provide the same safe, reliable, and effective service for its customers as it provides today.

74. Public Service asserts that the scope of work and final designs must be completed and provided to the Commission for review. In other words, Public Service argues that the flaws

of the Separation Plan need to be fixed, that the Company and Boulder need to prepare the scope of work and final designs in accordance with that revised Separation Plan, and that the assets for transfer then should flow from that work.

75. Public Service concludes that the fastest way for Boulder to get to the Go/No Go Decision is for the Commission to reject the Application, but decide as many issues as can be decided now in order that Boulder has the guidance it needs to move forward.

76. In summary, Public Service suggests that the Commission find that it is necessary for Boulder to do the following: (1) agree with Public Service's proposed modifications concerning substations, joint use of poles, and other feeder lines; (2) fund the preparation of the scope of work, detailed design drawings and specifications, cost estimates, and timeline; (3) apply for and complete the transmission load interconnection request process; and (4) provide the missing information concerning real property rights (Boulder's and Public Service's) and the terms and conditions of all required agreements. Public Service argues that if those conditions are met, Boulder could return to the Commission and request approval of its Separation Plan, and the Commission could expect to be in a position to make a preliminary determination as to whether Boulder's proposed, modified Separation Plan will preserve safety, reliability, and effectiveness as well as provide Boulder with a conditional transfer order (or, in other words, an order sufficient for Boulder to proceed to condemnation).

## **2. Staff**

77. Staff also takes the position that more siting and engineering work needs to be performed by both Boulder and Public Service before the Commission can render an opinion as to whether the Separation Plan is effective as well as safe, reliable, and not contrary to the public interest.

78. Staff envisions Public Service and Boulder working collaboratively towards finalizing the Separation Plan and returning to the Commission for final approval. Staff further suggests that the Commission require an independent engineer, overseen and selected by the Commission or Staff, to facilitate collaboration between Boulder and Public Service and to monitor the resolution of the remaining issues and the engineering details necessary for Commission approval of the Separation Plan. Staff also proposes regular reporting on the progress made by Boulder and Public Service.

79. Despite its position that the Separation Plan is not yet ready for approval, Staff recommends that the Commission approve the power facilities portion of the list of assets for transfer, subject to a reasonable true-up process necessary due to the changes that may result from the effect of the detailed design on certain elements of the Separation Plan, as well as normal changes to the system that occur over time.

80. Staff suggests that the Commission require Public Service to work collaboratively with Boulder to identify the non-recorded real property interests to be included in the final list of assets for transfer. Staff further recommends that the Commission find that Boulder cannot complete the condemnation process before the Commission approves the real property additions to the list of assets for transfer.

81. Staff argues that any order approving the transfer of assets to Boulder must be conditioned upon Boulder's full satisfaction of all financial obligations to Public Service, including any disputed payments that the Commission rules that Boulder must nonetheless pay. Staff also suggests that the Commission reserve an ability to consider Boulder's operational capability, after the Go/No-Go Decision but before the final transfer of assets occurs.

### 3. IBM

82. IBM argues that the lack of detail in Boulder's Application is a sufficient basis to deny the application in its entirety. IBM contends that Boulder has provided a Separation Plan for a "paper utility," showing no evidence that it can actually operate that utility, either from a financial or technical perspective. IBM contends that this lack of detail places IBM at significant financial and reputational risk because of IBM's need for 99.9 percent reliability as well as penalty provisions in its contracts with its customers. IBM further contends that it is contractually obligated to advise certain customers if backup generation is required and that Boulder's Separation Plan will require back up generation for weeks, and possibly months during construction. IBM further contends that the Boulder campus is IBM's largest facility in the world and that it has invested millions of dollars in configuring the substation.

83. IBM states that if the Commission is not yet prepared to deny the Application outright, it can and should decide the IBM-specific issue and deny the Application as to IBM.

### 4. OCC

84. The OCC requests that the Commission deny Boulder's Application without prejudice due to the numerous outstanding and significant issues raised in this Proceeding. For example, concerning the list of assets for transfer, the OCC argues that the Commission cannot approve the list at this time because it is a "snapshot in time" in that it is incomplete and already out of date.

85. The OCC contends non-Boulder Public Service ratepayers should suffer no harm as to costs. Specifically, OCC contends that no rate increases, directly or indirectly, should result from Boulder's municipalization efforts. Along these lines, the OCC takes the position that the litigation costs incurred by Public Service with regard to Boulder's municipalization efforts

should be a cost paid by Boulder and not passed on to ratepayers. The OCC argues that it is in the public interest for the Commission to address this cost recovery issue expressly in this Proceeding and to preclude the Company from including any Boulder municipalization costs, such as litigation costs for this Proceeding, in its upcoming electric rate case.

86. With regard to next steps, the OCC suggests that the Commission: (1) consolidate Phase 1 and Phase 2 activities; (2) adopt the “next steps” proposed by Public Service; (3) create a series of deadlines for the parties; and (4) enhance Commission oversight through the inclusion of Staff in these activities.

## **5. CU-Boulder**

87. CU-Boulder argues that it is contrary to the public interest to require Boulder and its citizens to pay all the legal and political costs Public Service incurs in connection with Boulder’s efforts to municipalize. CU-Boulder further argues that the Commission lacks authority to order Boulder to pay any costs that have already been incurred. Future costs incurred to protect the Company’s business interests, customers, and the statewide grid should be paid by Public Service’s ratepayers as a whole or by the Company’s shareholders.

88. CU-Boulder requests that the Commission order that Boulder only pay prudently- and actually-incurred costs of construction and separation, which order should be implemented through a transparent, fair, and periodic Commission-administered process.

## **6. Climax**

89. Climax argues that the Commission should prevent Public Service’s customers outside Boulder city limits from bearing any costs resulting from the City’s efforts to create a municipal electric utility, whether those costs have been incurred either in the past or will be incurred before or after the City’s Go/No-Go decision. Climax states that none of the costs

incurred by the City or the Company as a result of the City's efforts to municipalize, whether the City is successful or not, have been or will be caused by the "remaining customers."

**7. Evraz**

90. Evraz similarly requests that the Commission issue an order precluding Public Service from passing any costs of municipalization through to ratepayers remaining on the Company's system. Evraz adds that it is onerous for customers not represented by the OCC to participate in multiple proceedings related to the same topic.

**8. Tri-State**

91. Tri-State owns equipment located in Substation F and has an agreement with Public Service concerning construction, operations, and maintenance activities in Substation F. Tri-State relies on this agreement and its equipment to ensure the reliable delivery of electric power to Tri-States' member's system, Poudre Valley Rural Electric Association (PVREA), which also owns certain equipment located in Substation F. Tri-State intervened to ensure that its ability to deliver safe, effective, reliable electric power to PVREA is not adversely impacted. Tri-State takes no position on the merits of Boulder's plan but asks for the following: (a) to the extent the Commission makes any decisions related to Substation F or provides any direction to Boulder and Public Service with regard to Substation F, such decisions or direction should not constrain or predetermine any of the issues to be decided in the process applicable to determining the specific reconfiguration of Substation F;<sup>6</sup> (b) any Commission decisions or direction concerning Substation F should require Boulder to ensure that Tri-State's ability to provide safe, effective, and reliable service to its Member Systems through Substation F not be adversely

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<sup>6</sup> Hearing. Exhibit 600, Lehman Answer at 11:20-24.

impacted as a result of accommodating Boulder's proposal;<sup>7</sup> (c) Tri-State should be protected against any costs associated with modifications to Substation F needed to accommodate Boulder's proposal;<sup>8</sup> and (d) In the event that Substation Alt\_EF is found to be feasible, meets the separation and service objectives of Boulder and Public Service, and is otherwise consistent with the Commission's findings in this Proceeding, Boulder should be required to implement that alternative rather than its proposals for Substation F.<sup>9</sup>

## II. LEGAL OBLIGATIONS AND RESPONSIBILITIES

### A. Commission Jurisdiction

92. As has long been recognized, the Commission derives its authority from *Colo. Const.* art. XXV, and with respect to electric service, from Public Utilities Law. As relates to its constitutionally derived authority, article XXV bestows on the Commission:

all power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility, as presently or as may hereafter be defined as a public utility by the laws of the State of Colorado ....

Article XXV vests all power in the PUC to regulate public utilities both outside and within home rule cities.<sup>10</sup> However, such jurisdiction does not extend to municipally owned utilities except to the extent that their operations are outside city limits (discussed in more detail below).<sup>11</sup>

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<sup>7</sup> *Id.* at 11:24 – 12:1.

<sup>8</sup> *Id.* at 12:1-2.

<sup>9</sup> Hearing Exhibit 601, Lehman Cross-Answer at 6:1-6.

<sup>10</sup> See generally, *IREA v. District Court*, 4414 P.2d 911 (1966); *Pub. Utils. Comm'n. v. City of Durango*, 469 P.2d 131 (1970); *City of Craig v. Pub. Utils. Comm'n.*, 656 P.2d 1313 (Colo. 1983).

<sup>11</sup> Article XXV – "...nothing herein shall be construed to apply to municipally owned utilities." See, *City and County of Denver v. Pub. Utils. Comm'n.*, 507 P.2d 871, 875 (Colo. 1973).

93. The Commission also derives its authority from Public Utilities Law.<sup>12</sup> Those statutes, with their attendant case law, establish the scope of the Commission's authority over public utilities. The statutory authorities applicable in this matter include the following: § 40-1-103, C.R.S.; §§ 40-4-101, 102, 103, and 105, C.R.S.; and § 40-5-105, C.R.S.

94. The Colorado Supreme Court has defined the Commission as “an administrative agency whose function is to regulate public utilities within the parameters established by the Colorado Constitution and the Public Utilities Law.”<sup>13</sup> In defining a “public utility,” § 40-1-103(1)(a)(I), C.R.S., provides in relevant part:

The term “public utility”, when used in articles 1 to 7 of this title, includes every common carrier, pipeline corporation, gas corporation, electrical corporation, telephone corporation, water corporation, person, or municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses and every corporation, or person declared by law to be affected with a public interest, and each of the preceding is hereby declared to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this title.

Determining what constitutes a “public utility” is essential in defining the scope of Commission jurisdiction. The Commission has regularly cited specific case law when making this determination. While the Supreme Court (and the Commission) initially relied on a common law test to determine whether an entity was impressed with a public interest and held itself out as serving or ready to serve all members of the public, to define it as a utility, the Supreme Court subsequently rejected the prior common law test in favor of a statutory determination. The Supreme Court held that:

Whether a particular entity is or is not a public utility should therefore be analyzed at least at first, from the standpoint of whether the entity is a public

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<sup>12</sup> Title 40, C.R.S., articles 1 through 7, generally.

<sup>13</sup> *City of Montrose v. Pub. Utils. Comm'n.*, 629 P.2d 619, 622 (Colo. 1981); *Colorado Office of Consumer Counsel v. Mountain States Telephone & Telegraph Co.*, 816 P.2d 278, 283 (Colo. 1991).

utility within the contemplation of the constitution and the statutes concerning the PUC and, if so, whether that public utility is exempted from regulation by the constitution or statute.<sup>14</sup>

95. While the Commission possesses broad authority over public utilities, such jurisdiction does not extend to municipally owned utilities except to the extent that such utility operations are outside city limits.<sup>15</sup> Article XX § 1 of the Colorado Constitution establishes the powers of home rule cities and provides in relevant part that municipal corporations:

shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate ... light plants, power plants, ..., and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefore, for the use of said city and county and the inhabitants thereof, and any such systems, plants, or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided.

96. As particularly related to this Decision, Judge LaBuda of the Boulder District Court, in an order affirming a declaratory judgment decision by the Commission, determined that the pivotal question was “whether the constitutional rights in that instance (article XX and article XXV) were in conflict or may coexist.”<sup>16</sup> The judge held that the court must interpret the application of these constitutional rights under the facts of this case. It was clear to the judge that

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<sup>14</sup> *Board of County Commissioners v. Denver Board of Water Commissioners*, 718 P.2d 235, 243 (Colo. 1986).

<sup>15</sup> *See*, Article XXV “... nothing herein shall be construed to apply to municipally owned utilities.” *See also, City and County of Denver v. Pub. Utils. Comm’n.*, 507 P.2d 871, 875 (Colo. 1973).

<sup>16</sup> Boulder District Court Decision.

the Commission does not have jurisdiction to exercise its authority under article XXV when a municipality operates a utility solely within its boundaries under article XX.<sup>17</sup>

97. According to Judge LaBuda,

[t]he PUC has the authority to regulate public utilities and the facilities, which provide service within the City of Boulder as well as unincorporated Boulder. The City has the right to create a municipal utility to serve its citizens. These facilities are intimately intertwined. Therefore, it is necessary and appropriate for the PUC to determine how facilities should be assigned, divided, or jointly used to protect the system's effectiveness, reliability, and safety. Such a determination must be made prior to the City's condemnation of property for utility municipalization.<sup>18</sup>

98. Consequently, the Commission's jurisdiction in this Proceeding is a complex amalgamation of constitutional provisions, statutes, and Judge LaBuda's relevant findings. The outcomes reached by the Commission below carefully thread through those various provisions in order to provide direction to the parties as to how to proceed with Boulder's municipalization, especially as directed to the transfer of Public Service assets to Boulder.

## **B. Burden of Proof**

99. As has been often stated, as the party that seeks Commission approval or authorization, the applicant bears the burden of proof with respect the relief sought, and the burden of proof is by a preponderance of the evidence.<sup>19</sup> The evidence must be "substantial evidence," which the Colorado Supreme Court has defined as "such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion ... it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be

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<sup>17</sup> Boulder District Court Decision. *citing*, *City of Loveland v. Pub. Utils. Comm'n*, 580 P.2d 381, 383 (Colo. 1978); *City and County of Denver v. Pub. Utils. Comm'n*, 507 P.2d 871, 874-75 (Colo. 1973); *Town of Holyoke v. Smith*, 226 P. 158, 161 (Colo. 1924). Notably, the Boulder District Court Decision was issued under the assumption that at that time, Boulder intended to municipalize beyond its city limits.

<sup>18</sup> Boulder District Court Decision. at p.12.

<sup>19</sup> § 24-4-105(7), C.R.S., § 13-25-127(1), C.R.S., and Commission Rule of Practice and Procedure 4 *Code of Colorado Regulations* 723-1-1500.

drawn from it is one of fact for the jury.”<sup>20</sup> The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence.<sup>21</sup> A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

100. In this case, Boulder, as the applicant and party seeking Commission approval of each component of its Third Supplemental Application, has the burden of proof with respect to the relief sought in its application. Boulder must show, by a preponderance of the evidence that its application is not contrary to the public interest.

### C. Standard of Review

101. As related to the transfer of Public Service assets to Boulder, the applicable standard of review is set forth in § 40-5-105(1), C.R.S., which states in relevant part that: “[t]he assets of any public utility ... may be sold, assigned, or leased as any other property, but only upon authorization by the commission and upon such terms and conditions as the commission may prescribe.” In determining whether a proposed transfer should be granted, the Commission must evaluate whether the transfer is “not contrary to the public interest.”<sup>22</sup> A determination of whether a proposed transfer is in the public interest must involve a “balancing of the interests of the shareholders in a reasonable rate of return and the rights of the [remaining Public Service] ratepayers to receive adequate service at a price which reflects the cost of service.”<sup>23</sup>

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<sup>20</sup> *City of Boulder v. Pub. Utils. Comm’n.*, 996 P.2d 1270, 1278 (Colo. 2000) (quoting *CF&I Steel, LP v. Pub. Utils. Comm’n.*, 949 P.2d 577, 585 (Colo. 1997)).

<sup>21</sup> *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985).

<sup>22</sup> *Mountain States Tel. & Tel. v. Pub. Utils. Comm’n.*, 763 P.2d 1020, 1029 (Colo. 1988); *Buckingham v. Pub. Utils. Comm’n.*, 504 P.2d 677, 679 (Colo. 1972).

<sup>23</sup> *Mountain States Tel. & Tel.*, 763 P.2d at 1029.

102. Pursuant to 4 *Code of Colorado Regulations* (CCR) 723-3-3104(b)(IV) of the Commission's Rules Regulating Electric Utilities, an applicant for a transfer of utility assets must demonstrate that the transaction is not contrary to the public interest. The applicant must also provide the following information for the Commission to consider in balancing the interests of shareholders and ratepayers: (1) The benefits and detriments to customers of each utility and all other persons who will be affected by the transaction;<sup>24</sup> and (2) A comparison of the kinds of services rendered before and after the transaction and the costs of those services.<sup>25</sup>

103. The determination of the transfer standard of review has been addressed recently in two major asset transfer cases: Decision No. C11-0001, Proceeding No. 10A-350T,<sup>26</sup> *In the Matter of the Joint Application of Qwest Communications International, Inc., and CenturyLink, Inc., for Approval of Indirect Transfer of Control of Qwest Corporation, El Paso County Telephone Company, Qwest Communications Company, LLC and Qwest LD Corp.* The second asset transfer case was Decision No. R16-0058, Proceeding No. 15A-0667G,<sup>27</sup> *In the Matter of the Joint Application of SourceGas Distribution LLC, Rocky Mountain Natural Gas LLC, SourceGas LLC, SourceGas Holdings LLC, and Black Hills Utility Holdings, Inc. for all Necessary Authorizations and Approvals for Black Hills Utility Holdings Inc. to Acquire SourceGas Holdings, LLC.*

104. In the Qwest/CenturyLink transfer, the Commission determined that the proper standard of review was for the Commission to consider whether the merger and any conditions was "not contrary to the public interest" and would: (1) ensure no net harm to customers; and

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<sup>24</sup> Rule 4 CCR 723-3-3104(b)(V).

<sup>25</sup> Rule 4 CCR 723-3-3104(b)(VI).

<sup>26</sup> Decision No. C11-0001 was issued on January 3, 2011.

<sup>27</sup> Decision No. R16-0058 was issued on January 22, 2016.

(2) balance ratepayer and provider interests. In making this finding, the Commission abrogated the prior “consumer and producer welfare maximization test.”<sup>28</sup>

105. This standard of review was adopted in the Black Hills/SourceGas merger matter. There, the ALJ held that in determining whether the transaction at issue was not contrary to the public interest, the appropriate standard of review would be the standard adopted in Decision No. C11-0001, where the Commission determined that the “no net harm” and ratepayer/provider balancing tests were relevant to a determination of whether the merger was “not contrary to the public interest.” It was reiterated that the Commission was not required to choose a particular test over the other, and as a result, determined that the consideration should be whether the merger would ensure: (1) no net harm to customers; and (2) balance ratepayer and provider interests.<sup>29</sup>

106. We adopt this standard of review test here and will consider whether the proposed transfer of assets provides no net harm to Public Service ratepayers outside the city limits of Boulder, while balancing ratepayer and provider interests.

### **III. ASSETS FOR TRANSFER FROM PUBLIC SERVICE TO BOULDER**

107. Boulder seeks to acquire the electric distribution property, plant, and equipment, wherever located, that are used, in whole or in part, to serve electric customers within the city limits. Boulder argues that it has identified and described only the assets for transfer that are necessary for Boulder to provide service after separation. Boulder also states that in its identification of assets for transfer, the City has excluded any existing assets that are necessary

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<sup>28</sup> Decision No. C11-0001, Proceeding No. 10A-350T, ¶ 19.

<sup>29</sup> Decision No. R16-0058, Proceeding No. 15A-0667G, ¶ 76.

for Public Service to provide service after separation. Nevertheless, the identified assets are “subject to verification after preparation of detailed design and specifications.”<sup>30</sup>

108. Boulder argues that the facilities it has identified in this Proceeding provide the Commission with sufficient information to determine that they can be transferred to Boulder without impact to the safety, reliability, and effectiveness of the remaining Public Service system. Boulder states that the assets it seeks for approval for transfer are identified individually in Attachment SDC-7 and Highly Confidential Attachment SDC-8 (Hearing Exhibits 105, 105A, and 105B), as well as in Attachment SDC-18 (Hearing Exhibits 106 and 106A).<sup>31</sup> According to Boulder, there is no objection to the Commission’s authorization of the transfer of the vast majority of the facilities at issue.

109. Boulder contends that if its list of assets for transfer requires updating, because, for example, it is incomplete or contains errors, the update could be accomplished in days or, at most, weeks. In any event, Boulder takes the position that the completion of more detailed engineering designs and work plans to execute its proposed Separation Plan will not have a material impact on the assets for transfer.

110. Public Service argues that it is the Separation Plan, not the list of assets for transfer, which determines whether Public Service (and Boulder) will be able to provide safe, reliable, and effective service post-separation. Public Service further contends that the list of assets for transfer provided by Boulder is inaccurate, incomplete, and subject to change. According to the Company, the list: (1) includes assets that are not owned by Public Service or are not Public Service distribution system assets; (2) is missing assets Boulder proposes to take

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<sup>30</sup> Boulder SOP at 20.

<sup>31</sup> *Id.* at 23-24.

that are located more than 200 feet outside the Boulder city limits; and (3) includes assets that are located inside the Boulder city limits which Boulder proposes be retained by Public Service.

111. With respect to missing information, Public Service states that an updated list of assets must include any fee property owned by Public Service and any easements or licenses Public Service owns which Boulder seeks to acquire in whole or in part. Certain other assets outside of substations are also missing. However, Public Service states in its Statement of Position (SOP) that it would not object to a Commission order approving the transfer of these types of smaller, associated distribution system assets by description, noting that appraisers in condemnation can capture the value of these assets. Some of the items on the list of assets for transfer for facilities outside the substations could change depending on whether the Commission rejects the joint use of poles or particular substation options are pursued. In addition, Public Service suggests that the updated list of assets for transfer should reflect final substation configurations.

112. Staff states that the power facilities portion of Boulder's proposed list of assets for transfer probably contains sufficient detail for Boulder to proceed to condemnation even with the uncertainties surrounding the final configuration of the substations that will become part of Boulder's new electric utility. Staff suggests that some of this uncertainty could be addressed with certain allowances for a "true-up."

113. Staff also acknowledges that the list currently does not describe the real property rights with sufficient detail to protect both Boulder and Public Service post-separation. Staff suggests that the Commission should permit Boulder to initiate the condemnation process with the power facilities portion of the list of assets (again subject to true-up), but require a Commission-approved list of real property interests before its completion. Staff notes that

requiring Boulder to provide details concerning the real property rights that it seeks to include on the list of assets for transfer will require both Boulder to undergo an expensive title search process and Public Service to cooperate with Boulder to help identify the Boulder-related real property rights that it possesses but has never recorded.

114. We disagree with Public Service that it is necessary for the Commission to approve a Separation Plan prior to rendering findings on the assets for transfer. We further find that it is unnecessary for the Commission to render a decision on Boulder's proposed Separation Plan, either in its current form or in a modified form that either satisfies the conditions put forward by Public Service or results from the follow-on process contemplated by Staff. As discussed below, we conclude that Public Service will be able to continue to provide safe, reliable, and effective service post separation in accordance with good utility practice and industry standards in the design, construction, and operation of its system, provided that Boulder meets certain conditions in compliance with this Decision and the designation of assets for transfer is limited, at this time, to the assets *outside* the substations that presently serve the Boulder area.

**A. Assets *Inside* the Substations**

115. The facilities Boulder seeks to acquire inside the substations include protective equipment (including relaying, communications, and control equipment); power transformers and distribution switchgear; and easements for the City equipment and access. (The assets for transfer proposed by Boulder within the substations are the existing facilities and associated appurtenances shown in blue and identified as Boulder's on Highly Confidential Attachments TAG-6—as modified by Highly Confidential Attachment TAG-27—and TAG-7 through TAG-11.)

116. Boulder clarifies that the City is not requesting ownership of any real property within the substations, only equipment and access easements. Boulder also asserts in its SOP that none of the substation alternatives, *see* Section III.A.1 *infra*, would change the list of equipment Boulder is requesting for transfer.<sup>32</sup>

### 1. Colocation at Substations

117. Boulder argues that it is necessary that Boulder facilities be co-located with Public Service facilities in the substations that will be used to serve Boulder customers post-separation. Boulder explains that the very nature of network transmission service means that transmission and distribution providers will share substations. In other words, every distribution-only utility in Colorado has distribution facilities co-located in substations with the transmission facilities of its serving transmission utility. Boulder clarifies that it is not proposing to interconnect electrical facilities at the distribution level between Public Service and Boulder inside any of the substations. Boulder further states that the City anticipates paying Public Service for maintaining the common facilities including the ground grid, fence, and access road.

118. Boulder proposes the following for the six substations

- **Substation A.** Boulder proposes to acquire no existing facilities at Substation A. Boulder wants to add new facilities at this substation, specifically a new 50 MVA transformer in the spare bank. Boulder would require easements to place and access its equipment. Substation A presently serves about 6,800 customers within Boulder city limits and 173 customers outside of city limits. Under a scenario where Boulder acquires all distribution facilities at Substation B, Substation A could serve another roughly 2,250 Public Service customers post-separation.

Public Service takes the position that Boulder has not established that its proposal for Substation A will allow Public Service to provide safe, reliable and effective service to the 2,088 customers moving to Substation A from Substation B and the existing 173 customers served by Substation A. Public

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<sup>32</sup> *Id.* at 28.

Service also objects to the loss of the spare bank, listing both safety and reliability issues, and suggests that if Boulder eventually acquires the facilities in Substation A, the City may need the spare bank post separation, because Substation B may not be expandable.

Public Service states that it is willing to work with Boulder to try to find a solution. The Company offers an alternative proposal called “Alt\_A,” in which Boulder takes all of the distribution assets at Substation A and Public Service builds a new substation to provide its own substation transformer backup for the 2,088 customers in Left-Hand Canyon. Boulder portrays the ALT-A proposal as costly and risky due to siting concerns.

- **Substation B.** Boulder proposes to acquire all distribution facilities at this substation. Boulder would require easements to access its equipment. Substation B presently serves about 24,600 customers within Boulder city limits and 3,175 customers outside of city limits.

Public Service states that the transmission facilities at Substation B are critical components of the Company’s 115 kV transmission loop. Public Service argues that space is limited within the existing footprint of the substation and that the Company is therefore concerned about co-locating with Boulder without some physical separation of the transmission and distribution facilities. Public Service states that physical separation might be possible and should be fully evaluated when Boulder submits its request for load interconnection at Substation B. However, separation could require expansion of the substation footprint and relocation of certain distribution facilities into that expanded area so that a fence could be constructed around each set of facilities.

- **Substation C.** Boulder proposes to acquire no existing facilities at this substation. However, Boulder proposes to expand the substation to accommodate new facilities. Specifically, Boulder would have two new transformers on a radial transmission bus. Boulder would require easements to place and access its equipment. Substation C presently serves about 4,500 customers within Boulder city limits and 3,600 customers outside of city limits.

Public Service explains that Boulder’s proposed design for Substation C would likely run into complications during the transmission load interconnection process under Public Service’s OATT, due to a radial transmission line at the site. Under the Company’s alternative proposal, or Alt\_C, Boulder’s new transformers would need to be built in a new substation adjacent to and contiguous with the current substation.

Boulder agrees to evaluate the Alt\_C proposal. However, Boulder proposes that Public Service continue to own the land and provide an easement for Boulder’s facilities at Alt\_C. Public Service does not agree with Boulder’s

proposal that Public Service own land on which Boulder's substation facilities would be located. Public Service argues that, although Public Service owns the unfenced land north of the existing substation, the Company should not have to construct and own an expanded substation. Public Service states in its SOP: "The next step should be Boulder submitting a request for interconnection for Alt\_C so that a final design for Alt\_C can be determined. This will result in a final design that will then allow for identification of the respective substation real property rights for Public Service and Boulder. A substation co-location agreement can also be negotiated at the same time."<sup>33</sup>

- **Substation D.** Boulder proposes to acquire all distribution facilities at this substation. Boulder does not propose the construction of any new facilities at this substation. Boulder would require easements to access its equipment. Substation D presently serves about 14,500 customers within Boulder city limits and 12 customers outside of the city limits.

Public Service argues that the Company's transmission facilities at Substation D cannot be physically separated from the distribution transformers at the site because the substation is too small. Nevertheless, Public Service witness Chad Nickell states that the Company is willing, subject to negotiation of a satisfactory substation sharing agreement, to co-locate with Boulder in Substation D. Public Service explains that the transmission facilities in Substation D serve only Substation D (*i.e.*, they are "in and out" transmission facilities) and, with the appropriate breakers in place, the impact to Public Service's transmission facilities of any problems associated with co-location in Substation D will be limited to Substation D, which is proposed to serve only Boulder customers after separation.<sup>34</sup>

- **Substation E.** Boulder proposes to acquire no existing facilities at this substation. However, Boulder wants to add new facilities at this facility—specifically a transformer and a "breaker and a half scheme." Boulder would require easements to place and access the new equipment. Substation E presently serves about 1,600 customers within Boulder city limits and 7,500 customers outside of the city limits.

Public Service argues that Boulder's proposals for Substation E will require an expansion of the substation beyond the existing fence. Public Service also argues that Boulder should be required to have a new control building at the substation. Public Service is concerned that Boulder's proposal, without these necessary additions, would limit the Company's ability to address its own future transmission and distribution needs. As described below for

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<sup>33</sup> Public Service SOP at 119-120.

<sup>34</sup> Hearing Exhibits 202 and 202A, Nickell Answer at 109-110.

Substation F, Public Service proposes an alternative for both Substations E and F called Alt\_EF.

- **Substation F.** Boulder proposes to acquire all distribution facilities at this substation. Boulder also proposes that a ring bus be installed, as well as a transformer, to serve Boulder customers post-separation. Boulder would require easements to place and access its equipment. IBM is presently the only retail electric customer served by Public Service through Substation F.

In its SOP, Tri-State states that it remains concerned that Boulder's proposals for Substation F could impact Tri-State's operations and maintenance responsibilities at the substation. Tri-State takes wholesale service from Public Service's transmission equipment located at Substation F. Tri-State also owns equipment located in Substation F, including a 230-24.9 kV transformer, a 230 kV circuit switcher and disconnect switch, and a 24.9 kV circuit breaker and disconnect switch. Tri-State has an agreement with Public Service concerning construction, operations, and maintenance activities in Substation F. Tri-State serves its member system PVREA from Substation F, and PVREA also owns certain equipment located in Substation F. Tri-State states that the implementation of Boulder's proposed changes to Substation F will require an outage of the Public Service line serving Tri-State, which will cause PVREA to shift its load to another substation to allow the construction to occur. Therefore, Tri-State wants to ensure an opportunity to participate in the applicable utility or regulatory process that decides the reconfiguration of Substation F.

Public Service describes Boulder's proposals for Substation F to be significant, requiring an expansion of the substation footprint. Public Service explains that during construction: "each of the two transmission lines coming into the Substation would have to be taken out of service in order to be connected to the proposed new locations on the ring bus. When a transmission line is out of service, IBM will only be radially fed. This will deprive IBM of the redundancy it currently has which is critical to the reliability it requires. If there is a transmission event on the line providing the radial feed, then the customer would experience an outage."<sup>35</sup>

Public Service proposes an alternative called Alt\_EF in which Boulder's two new transformers would be located in a single new substation at Boulder's wastewater treatment plant which has ready access to Public Service's transmission line.

Boulder requests that, in addition to approving its proposals for Substations E and F, the Commission also approve Substation Alt\_E\_F to allow Public Service and Boulder to explore the alternative. Boulder states that Substation Alt\_EF may not be able to be sited, but recognizes that if Substation Alt\_EF

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<sup>35</sup> *Id.* at 122.

is feasible, the City's proposed construction at Substations E and F will not be necessary.

119. Boulder argues that no party objects generally to co-location within the substations provided there are reasonable access restrictions and, where appropriate, separation between the Public Service and Boulder facilities. Boulder argues that the Commission needs to determine that the City's proposed co-location of facilities within Substations A through F will not negatively impact safety. Boulder argues that the City's distribution facilities and Public Service's transmission and distribution facilities in the same substation provides no additional safety, security, or reliability concerns as compared to a substation with Boulder distribution facilities and just Public Service transmission facilities. Boulder states that all facilities in a substation must meet National Electrical Safety Code (NESC) requirements, be isolated from the public, grounded, and secured within a fence or other permanent boundary. Boulder continues that, if facilities are appropriately designed and maintained, if appropriate safety precautions are taken, and if the utilities engage in appropriate coordination, there is no reason why two or more utilities cannot effectively, reliably, and safely co-locate facilities in the same substation.

120. For all substations, Boulder requests that the Commission allow Boulder and Public Service to resolve the issues associated with co-location and substation configuration—such as physical separation, equipment access, easements—in Public Service's OATT processes. Specifically, Boulder requests that the Commission order Public Service to process the City's Network Integration Transmission Service (NITS) application pursuant to the OATT within three months of Boulder's filings and to direct Public Service to work with Boulder to create the detailed drawings and specifications for the substations, as required. (Boulder wants Public Service to obtain bids from contractors for any new equipment and construction.) Boulder volunteers to make a compliance filing with the Commission describing the substation

configurations approved in the NITS process and providing the substation co-location agreements.<sup>36</sup>

## 2. Positions of the Intervening Parties

121. Public Service argues that Boulder's list of assets for transfer, for assets both *inside* and *outside* the substations, is incomplete. Public Service states, for example, that the substation general arrangements provided by Boulder include only boxes that indicate where the City would like easements. Public Service argues that the list includes no legal descriptions and notes that no terms and conditions for Boulder's easements have been proposed.

122. Public Service further argues that Boulder acknowledges that the actual location, design, and configuration of facilities in substations are determined during the transmission load interconnection process. Public Service concludes that, in order for the Commission to evaluate whether Public Service will be able to provide safe, reliable and effective service, it is necessary to know what real property rights Boulder will actually need inside substations, and that cannot be known until Boulder applies for and completes the transmission load interconnection process.

123. Public Service adds that this information about property rights within the substations is also necessary for the condemnation case because the real property rights Public Service will have post separation, and any burdens on Public Service caused by Boulder's easements and colocation must be included in determining just compensation.

124. Public Service also notes that the OATT does not specify the requirements for new facilities, or any particular configuration of facilities, beyond the general "Good Utility Practice" standard. The Company continues that FERC does not directly review or pre-approve

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<sup>36</sup> Boulder SOP at 12-13.

the engineering configuration of Public Service electric transmission facilities prior to construction or modification.

125. From a legal perspective, Public Service argues that Boulder's proposed co-location at substations cannot be ordered by the Commission pursuant to § 40-4-105(1), C.R.S.

126. In sum, Public Service argues that it is premature to approve the asset list when "ideas are still being developed" that, with respect to substations, impact system "separation and reconnection."<sup>37</sup> Public Service argues that load interconnection requests are the first step to establishing the physical configuration at all substations and are the basis for substation sharing agreements that must be negotiated so that risks can be evaluated. Public Service argues that Boulder must complete the transmission load interconnection process and the negotiation of the substation agreements before a determination can be made regarding the new and any existing facilities and real property rights Boulder is seeking inside substations.

127. Staff agrees with Public Service that the Commission does not know the location and configuration of the substations that will comprise the new Boulder electric utility. Staff similarly argues that neither Public Service nor Boulder can state whether the various substation proposals will receive approval under the OATT processes.

### **3. Findings and Conclusions**

128. We find that it is premature to authorize the inclusion of facilities inside the substations on the designated list of assets for transfer. We find that Public Service has provided compelling evidence that it requires the existing distribution assets within Substations A, B, C,

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<sup>37</sup> Public Service SOP at 2.

and E, because they are currently used to provide service to customers that Public Service will continue to serve upon separation. We recognize, however, that Boulder and Public Service may reach agreement on a transfer of assets at any or all of these substations. It is further possible that Public Service could no longer require distribution facilities at a particular substation (e.g., Substation B) as a result of facilities' transfers and system reconfigurations prior to separation. We thus decline to approve assets for a transfer that may not be required by Boulder in order to serve its customers, post separation.

129. The record indicates that Boulder can proceed to submit transmission service load interconnection requests with Public Service's transmission function for facilities *outside* of the substations. *See* Section III.B.3 *infra* conditionally approving designation of assets outside substations for transfer. It is reasonable for Public Service and Boulder to rely upon the transmission load interconnection request process, and also the NITS process, to attempt to resolve the required configurations and ownership arrangements inside the substations.

130. The outcomes of these transmission load interconnection requests and NITS applications also may determine that Boulder will need to construct new substations in order to begin operations as a municipal utility. Alternatively, Public Service and Boulder may reach agreement on the sale to Boulder of existing transformers and other distribution equipment within the substations. The Commission can approve the transfer of facilities inside substations at a later time, because sales of facilities to Boulder will require Public Service to file application(s) under § 40-5-105, C.R.S.

131. Although the record indicates that distribution facilities at Substation D may not be useful to Public Service to serve Public Service customers upon separation, we also find it premature to include Substation D assets on the list of assets for transfer at this time. Based on

testimony, it appears likely that Public Service and Boulder will be able to work out arrangements for Substation D through the transmission load interconnection and NITS processes.<sup>38</sup>

132. We find that it also is premature to include Substation F assets on the list of assets for transfer at this time, because the continued examination of the Alt\_EF proposal could alter Boulder's transmission load interconnection requests and NITS applications for Substation F and hence change the configuration and use of that substation.

**B. Assets *Outside* the Substations**

133. The facilities that Boulder seeks to acquire *outside* of the substations include the following: (a) overhead and underground distribution lines; (b) distribution transformers (pole and pad mount); (c) overhead and underground secondary and service conductors; (d) fiber optic and other communications equipment associated with the distribution system; (e) meters and other equipment; (f) streetlights and traffic lights within the city limits that are owned by Public Service; and (g) the property interests associated with those assets.

134. The assets for transfer proposed by Boulder outside of the substations are the components of every distribution feeder system in Attachment TAG-5, Volume I, page 11.<sup>39</sup>

135. Boulder acknowledges that the data it received from Public Service did not include complete information regarding customer meters, manholes, services and secondaries, vaults, and fiber optic and communications facilities. Boulder states that it proposes to acquire

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<sup>38</sup> Hearing Exhibits 202 and 202A, Nickell Answer at 109-110; Hearing Exhibits 104 and 104A, Ghidossi Rebuttal at 53.

<sup>39</sup> Hearing Exhibit 103.

these facilities and requests that the Commission approve the transfer of all of these “ancillary assets and appurtenances” to the extent they are associated with the electric distribution system serving Boulder customers upon separation.

### **1. Boulder’s Position**

136. Boulder argues that it is undisputed by Public Service that Boulder’s Separation Plan will, if constructed as proposed, allow Public Service to deliver electricity to its customers over a system: (1) with the same or better capacity and voltage levels as today; (2) that is capable of maintaining at least as much capacity and voltage as the system today, even under N-1 conditions; (3) that generally reduces or maintains the number of switching operations needed to restore service in the event of a feeder trunk outage; (4) that allows Public Service to restore service just as quickly in the event of a transformer failure wherever it currently exists; and (5) that complies with the requirements of the NESC. Boulder therefore requests that the Commission find that the Separation Plan will, if implemented as proposed by the City, result in a system for Public Service that is as effective, reliable, and safe as the current system.

137. Boulder states that it seeks only assets owned by Public Service. Boulder states that it is not seeking to acquire assets owned by anyone other than Public Service, such as poles owned by Qwest Corporation, doing business as CenturyLink QC (CenturyLink).

138. Boulder requests that the Commission approve for transfer both the assets that exist today and any new assets Public Service adds to the system in Boulder before the Cut-Over Date that will serve Boulder customers, upon separation.

139. Boulder requests that the Commission require Public Service to provide, within 60 days of a final order to this phase of the proceeding, an update to the GIS model and the

Synergi model describing any new assets that will, post-separation, serve Boulder customers.<sup>40</sup> Boulder further states that it is willing to provide, within 30 days of the Commission's final order in this phase of the proceeding, the recorded property interests for property rights associated with the assets. However, Boulder requests that the Commission require Public Service to, within 30 days of the Commission's final order in this phase of the proceeding: (1) identify any unrecorded property interests associated with the facilities that will be owned by Boulder, post-separation; and (2) identify any instances where Public Service's gas facilities or transmission facilities share an easement with its distribution facilities and the portion of any such easement Public Service needs to retain to provide gas or transmission services.<sup>41</sup>

140. In addition to the facilities explicitly listed by Boulder, the City seeks to acquire the specific non-exclusive portions of the real property interest necessary for the facilities that will be owned by Boulder. Boulder clarifies that it is not requesting the transfer of any real property interests associated with assets that are necessary for Public Service to serve its gas or electric customers post-separation.

## 2. Positions of the Intervening Parties

141. Public Service argues that the real property rights Boulder seeks to acquire must be identified and any necessary sharing arrangements negotiated where there are gas or transmission facilities in or on the same property rights. Public Service also asserts that once condemnation starts, Public Service's bargaining power to negotiate agreements and real property rights for itself will be limited because neither the Commission nor Public Service can call a halt to the condemnation proceedings or alter their course once they have commenced.

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<sup>40</sup> Boulder SOP at 6-7.

<sup>41</sup> *Id.* at 7.

142. Staff recommends that the Commission should approve the physical assets portion of the list of assets for transfer now (and thus, permit the commencement of condemnation proceedings), as long as the list is still subject to another subsequent approval.

### 3. Findings and Conclusions

143. We approve the designation of assets for transfer *outside* of the substations. However, as discussed below, we place three conditions on Boulder to secure this approval.

144. The record in this Proceeding supports the conclusion that Public Service can provide safe and reliable service to its customers during separation and after the Cut-Over Date upon the transfer of assets outside the substations. No party has argued that Public Service's existing system is not safe, reliable, and effective. Public Service will retain its feeder lines serving customers outside of the city limits and, in accordance with our decision above, the substations that serve those lines. Boulder's engineers have modeled the existing system and have shown that it satisfies voltage and capacity requirements. Provided that Public Service also secures sufficient property rights to operate and maintain its feeders remaining in Boulder, it is reasonable to conclude that Public Service will have the means to operate its system post-separation in a manner that is as safe, reliable, and effective as it is pre-separation.

145. Public Service recommends that Boulder move forward with the transmission load interconnection process.<sup>42</sup> That recommendation would support a conclusion that Boulder's acquisition of the feeder lines would not result in a less safe, effective, and reliable system for Public Service after separation. Public Service witness Chad Nickell's advocacy also focused almost exclusively on the substation configurations and the associated joint-use of poles for

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<sup>42</sup> Public Service SOP at 23.

backups as recommended by Boulder. Public Service primarily suggests that any updated list of assets for transfer should reflect final substation configurations. However, this Decision results in no change in substation configurations, at this time.

146. In addition, Mr. Nickell testified that it is not necessary for Public Service to operate any new substation transformers that Boulder will own in order to serve customers up until the Cut-Over date. He also explains that there is no need for any of the City's new substation facilities to be used by Public Service to provide service and they can be constructed and ready to be placed in service without Public Service having any responsibilities (other than temporarily providing load for testing).<sup>43</sup> Likewise, he states that it is also not necessary for Public Service to integrate Boulder's distribution facilities outside of the substations in order to serve customers before separation.<sup>44</sup> Boulder agrees with Mr. Nickell, since the City takes the position that operations of the system until the Cut-Over Date will "not require a departure from the status quo until the systems are separated" and hence will not be the contrary to the public interest.<sup>45</sup>

147. Based on the above, the Commission is reasonably assured that Public Service will be able to provide safe, reliable, and effective service upon Boulder's acquisition of the feeders, particularly since decisions on substation configurations would be subject to the transmission load interconnection process under Public Service's own OATT. A safe, reliable, and effective system is also enhanced if the Commission declines to order the joint use of poles, as addressed below.

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<sup>43</sup> Hearing Exhibit 203, Nickell Cross Answer at 19.

<sup>44</sup> *Id.* at 21.

<sup>45</sup> Boulder SOP, 58.

148. Accordingly, we hereby find that if Boulder acquires the distribution facilities outside of the substations, through either a negotiated sale or condemnation, Boulder will have the technical means (*i.e.*, the facilities and associated property rights) to create a municipal utility. Boulder will connect its distribution facilities to substations, where Boulder will receive transmission service from Public Service. As a municipal electric utility, Boulder will have the right to build new substations in order to serve the distribution facilities on the list of assets for transfer in the event the City is unable to reach agreement with Public Service on the purchase and/or reconfiguration of the existing substations through the normal transmission load interconnection process.

**C. Conditions on the Approval of Assets for Transfer**

**1. Access to Rights of Way and Other Real Property Rights**

149. The creation of a municipal utility in Boulder will occur within a well-established portion of Public Service's existing service area, wherein the Company has already built a highly integrated grid. Public Service will require significant facilities to be located within Boulder city limits post-separation, and Public Service will require access to rights of way and other property rights within Boulder city limits for those facilities, even though most Boulder City customers will not be served by Public Service. Public Service also will be required to reconfigure certain existing facilities and to construct new facilities in order to serve its customers after separation. For example, new connections between substations within Boulder likely will be necessary for "backing up" facilities used to serve Public Service customers post separation if Boulder acquires distribution facilities within certain existing substations.

150. We therefore agree with Public Service that the separation of the systems will require Public Service to secure permanent, non-exclusive easements and other necessary real

property rights for the location of its electric facilities within Boulder city limits that are necessary for Public Service to provide service to its customers after separation. We further agree with Public Service that non-permanent rights create the risk that Public Service will not be able to continue to serve its customers post separation, a situation which could cause Public Service to incur additional costs if Boulder requires Public Service to relocate, remove, or underground facilities in the future on one or more occasions.<sup>46</sup>

151. As a condition to the designation of the assets for transfer *outside* the substations, we require Boulder to file an agreement reached between Boulder and Public Service that provides Public Service permanent non-exclusive easements and other necessary real property rights for the location of its electric facilities within city limits that are necessary for Public Service to provide service to its customers after separation. Such an agreement is essential to preserving Public Service's ability to serve its customers post-separation.

## **2. Addressing Deficiencies in the List of Identified Assets**

152. We are persuaded by Public Service that Boulder's list of identified assets for transfer, even for items *outside* of the substations as provided in the record, is incomplete and contains errors that must be corrected.

153. As a second condition to the designation of the assets for transfer *outside* the substations, we require the filing of a revised list that is accurate and complete. The updated list shall not include assets that Boulder proposes Public Service should retain; it shall include the assets Boulder proposes to take that are outside Boulder city limits; and it shall not include CenturyLink poles or Public Service transmission poles.

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<sup>46</sup> Public Service SOP at 147-148.

154. It is not necessary for the updated list to itemize the ancillary assets and appurtenances *outside* of the substations. We note that Public Service does not object to a Commission order approving the transfer of smaller, associated distribution system assets by description.<sup>47</sup> The facilities listed by type may include customer meters, manholes, services and secondaries, vaults, and fiber optic and communications facilities.

155. The updated list also shall include real property interests associated with the assets Boulder seeks to acquire (*e.g.*, the property rights outside of the Boulder rights of way). We find that it is necessary for the Commission and Public Service to understand which property rights Public Service risks losing through municipalization to be assured that Public Service will retain its ability to provide safe, reliable, and effective service to its customers after separation.

156. While we decline to order either Public Service or Boulder to contract for the title work necessary to identify all of Public Service's real property rights associated with the assets Boulder seeks to acquire (*e.g.*, fee lands, easements, or licenses), Boulder shall be responsible for the associated expenses to comply with this condition. Per its offer, Public Service shall work with Boulder to identify any real property in which gas or transmission facilities are located with electric facilities.<sup>48</sup> Public Service also shall assist Boulder in identifying unrecorded claims to a property interest associated with the facilities that would be owned by Boulder, post-separation and the instances where Public Service's gas facilities or transmission facilities share an easement with the electric distribution facilities, including the portion of any such easement Public Service must retain to provide gas or transmission services.

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<sup>47</sup> *Id.* at 200.

<sup>48</sup> *Id.* at 194.

### 3. Agreement(s) on Boulder's Reimbursement of Public Service's Costs

157. As a third condition to the designation of the assets for transfer *outside* the substations, we require the filing of an agreement (or multiple agreements) between Boulder and Public Service that addresses the payment by Boulder of costs incurred by Public Service to effectuate the separation of the systems. Such an agreement(s) is necessary, since, as discussed below in Section IV.D.3., we reject Boulder's proposal that Public Service finance all work for reimbursement just prior to the Cut-Over Date.

158. The required agreement(s) shall address both the reimbursement of costs incurred by Public Service associated with Boulder's compliance with these conditions tied to the approval of the assets for transfer, pursuant to this Decision, and the costs associated with the following: (1) the development of scope of work documents and detailed design drawings and specifications; and (2) new construction and reconfiguration work costs incurred by Public Service to effectuate the separation of the systems.

159. In recognition that Boulder may change its mind about municipalization after construction and separation activities have begun, the agreement(s) also should address how Public Service will recover from Boulder the costs that will be incurred to restore the two systems to a single electric system, as suggested by Public Service.

160. The agreement(s) should also address the following: (1) respective responsibilities for the repair and replacement of existing facilities while Public Service is still providing service to customers within Boulder; (2) how failures and damages will be addressed after the date value is established in the condemnation case and up to the Cut-Over Date; and (3) any other final "true up" at the Cut-Over Date not otherwise addressed by the condemnation court.

161. We conclude that the Commission's review and approval of such an agreement(s) is in the public interest, because it is the most reliable means for the Commission to protect remaining Public Service ratepayers from paying costs that should be borne by Boulder. We note, however, that the agreement(s) will not be jurisdictional to the Commission and, as addressed more fully below, the Commission will not have authority to resolve disputes arising from the compliance with the agreement(s).

#### 4. Filing Deadline and Review of Compliance Conditions

162. Boulder shall submit no later than 90 days following the issuance of this Decision, the filings required above for final approval of the designation of assets for transfer *outside* the substations. Boulder shall make a single filing satisfying all requirements of the three conditions. Boulder may file a request for additional time for good cause shown.

163. Any party may file a request for hearing on all or parts of the filings by Boulder no later than 30 days after the filing is submitted. In the event that a party requests a hearing on Boulder's filing, the matter will be referred to an Administrative Law Judge (ALJ) for a recommended decision on whether Boulder has satisfactorily met the conditions set forth above and whether the Commission approves the designation of assets for transfer *outside* the substations. The Commission will then address the recommended decision under § 40-6-109(2), C.R.S. In the event no party requests a hearing on Boulder's filing, the Commission will render a decision granting final approval of the assets for transfer *outside* the substations.

164. As explained below, the approval of the assets for transfer by this Decision is made in accordance with the Boulder District Court Decision. The decision rendered on the assets for transfer will not be a preliminary approval of the transfer of assets under § 40-5-105, C.R.S., as contemplated by the advocacy of certain parties. Final approval of the transfer of

assets under § 40-5-105, C.R.S., will be accomplished, as necessary, in a separate proceeding by a joint filing of an application for voluntary transfer of assets from Public Service to Boulder.

#### **IV. BOULDER'S PROPOSED ASSOCIATED AUTHORIZATIONS AND RELIEF**

##### **A. Joint Use of Poles**

##### **1. Boulder's Proposal**

165. Boulder proposes the joint use of existing poles when “above-ground” infrastructure already exists and another circuit is required for the other utility. Boulder proposes that Public Service would continue to own any poles jointly used by Boulder and Public Service. Boulder would pay the joint use fee and all “make-ready costs” required to accommodate Boulder’s system. Boulder states that, because Public Service had not provided the City with information on the age and condition of existing infrastructure, Boulder has assumed that all of the affected poles would be replaced.

166. Boulder argues that the joint use of poles prevents the duplication of facilities in the same area and that it is common practice between utilities. Boulder also argues that having two utilities on a pole does not, by itself, negatively affect reliability. To ensure system safety, Boulder acknowledges that the joint use of poles requires a degree of coordination. Boulder states that it is willing to abide by all of the restrictions placed by Public Service on other electric utilities that have joint use arrangements with Public Service, as well as any other reasonable terms and conditions as may be imposed by the Commission. Boulder states that the two electric utilities will have to communicate and have a protocol for planned and emergency work on feeders and equipment on joint use poles.

167. Boulder argues that the Commission has the authority to require joint use of regulated facilities. Boulder further argues that Public Service already engages in pole sharing with other electric utilities as well as cable and phone companies.

168. Boulder estimates that undergrounding all of the joint-use-pole circuits proposed in the separation plan would cost roughly \$30 million, an increase of some 40 percent of the present cost of the Separation Plan.

## **2. Public Service's Position**

169. Public Service explains that Boulder proposes 27.5 miles of new construction of poles for joint use, plus 5.1 miles of existing double-circuit poles that would be split for joint use. The proposed joint use poles would affect 15 of the 28 feeders that would provide service to Boulder customers and would affect 8 of the 9 feeders that Public Service would use to provide service to its customers post-separation.

170. According to Public Service, Boulder is proposing to remove the existing poles (some of which are owned by CenturyLink) and replace them with new poles capable of holding circuits for both Boulder and Public Service. The joint use poles within city limits would be used both to serve Boulder's circuits and to backup for Public Service, the ties between Substations C and A. The joint use poles outside of the city limits would be used both to serve Public Service's circuits and to provide backup ties between "Boulder's substations."

171. Public Service raises numerous safety and reliability issues associated with joint use poles. Public Service takes the position that there are significantly better designs that would assure a higher level of the safety and reliability of service. The Company further states the system would be inherently more risky and more likely to result in a safety incident, which makes the proposal unacceptable to the Company. Public Service also argues that Boulder's

proposal is not fully developed. For example, according to the Company, Boulder cannot complete the proposed backup feeder on joint use poles for Public Service's Substation A transformer without acquiring the right to take CenturyLink poles and convert them to "joint use" by Boulder and Public Service, with ownership by Public Service.

172. Public Service presented the testimony of Lawrence Gelbien, an independent expert, who testified that the joint use of poles is not common in the industry because of safety and reliability reasons and that the NESC establishes minimum requirements, not operational goals, for safety.<sup>49</sup> Mr. Camp, on behalf of Staff, agreed that the NESC provided an engineering minimum standard, not a safety standard.<sup>50</sup>

173. From a legal perspective, Public Service argues that Boulder's proposed joint use of poles is outside the scope of the joint use statute, *i.e.*, § 40-4-105(1), C.R.S., in part because Boulder is not requesting to use existing facilities, but is instead requesting that it be allowed to use new poles that Public Service would be forced to construct, own, and maintain. Public Service further argues that Boulder has never cited any legal authority for the Commission to compel the joint use of poles.

### **3. Findings and Conclusions**

174. We decline to compel Public Service to enter into any "joint use" of pole arrangement. We conclude that if the joint use of poles is necessary in any particular circumstance, the arrangement should be worked out with mutual consent by both Boulder and Public Service.

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<sup>49</sup> Hearing Transcript, July 31, 2017, at 211-243.

<sup>50</sup> Hearing Transcript, August 7, 2017, at 149-153.

175. Public Service has provided reliable testimony that the joint use of poles will likely decrease the safety and reliability of its electric distribution system. We therefore find that the joint use of poles should only be implemented upon mutual agreement by both Boulder and Public Service. Boulder has failed to persuade us that the "joint use" of poles is either necessary or warranted at this time.

## **B. Detailed Design Drawings and Specifications**

### **1. Boulder's Proposal**

176. Boulder requests that the Commission direct Public Service to contract with a third-party engineering firm acceptable to Boulder to perform engineering work after the Commission issues a Phase 1 decision that approves both Boulder's assets for transfer and the City's proposed Separation Plan. Boulder envisions that the third-party engineering firm, Public Service, and Boulder will work together to complete detailed design drawings and specifications for the facilities located outside substations. The third-party engineering firm also would develop a cost-estimate and an estimated timeline for the separation of the two systems and would solicit bids for the construction required under the Separation Plan.

177. In its SOP, Boulder requests that the Commission direct Public Service and the City to develop a scope of work for the detailed design drawings and specifications within 30 days following the Commission's final order in this phase of the proceeding. Within 12 months (but with monthly progress reports), Public Service and Boulder then would be directed by the Commission to engage in the following activities: (1) develop detailed design drawings and specifications with cost estimates and proposed timelines; (2) negotiate any required operation agreements to implement emergency backup arrangements and joint use agreements; and (3) negotiate a cut-over agreement regarding when and how Boulder-owned

facilities will be physically integrated into the Public Service system and how such facilities will be maintained before the Cut-Over Date. Following that 12-month process, Boulder states that it will make a “Phase 2” filing seeking approval of those detailed design drawings and specifications and agreements.<sup>51</sup>

178. Also in its SOP, Boulder states the City is willing to enter into a contract with Public Service that requires the Company and, separately any Public Service contractors to the extent they are employed for the design work, to invoice Boulder monthly for the “actually- and prudently-incurred costs.” Boulder further agrees to pay those costs directly to Public Service contractors and, if applicable, to the Company directly, on a monthly basis. Boulder argues that there is no need to require Boulder to provide additional payment assurances or security other than the proposed contract.<sup>52</sup>

## **2. Positions of the Intervening Parties**

179. Public Service objects to using third-party design engineers to prepare scope of work documents. Public Service takes the position that those decisions on scope of work, which should encompass planning for the logistics of cut-over, should be made by the Company and Boulder and not by third party design engineers, because it is Public Service and Boulder who have interests at stake in those decisions. Public Service also suggests that once the scope of work documents are done by the City’s and the Company’s engineers, at least as to Public Service’s distribution work, it will not be necessary to have engineers prepare the detailed design drawings, because the drawings can be completed by less expensive designers.

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<sup>51</sup> Boulder SOP at 14.

<sup>52</sup> *Id.* at 16.

180. Staff agrees that Public Service should be responsible for the development of detailed drawings, the specifications bid package, and cost estimates for construction and reconfiguration of the facilities that will exclusively serve Public Service's customers after separation. Likewise, Staff suggests that Boulder should be responsible for the development of detailed drawings, the specifications bid package, and cost estimates for the construction and reconfiguration of the facilities that will exclusively serve Boulder's customers after separation.

### 3. Findings and Conclusions

181. The parties appear to have reached agreement that the development of a scope of work is essential to an efficient development of detailed drawings and specifications. While we concur with Public Service that decisions on scope of work should encompass the planning for the eventual logistics of cut-over, and while we agree with the parties generally that Boulder and Public Service will need detailed drawings and specifications to implement the separation of the two systems, we are not convinced that it is necessary to compel Public Service to contract with a third-party engineering firm or to direct the Company to take any other specific action in the furtherance of this work. Moreover, the Commission lacks authority to compel Public Service to enter into the types of arrangements proposed by Boulder.<sup>53</sup> Setting aside such legal deficiencies of Boulder's proposal, we are not persuaded that ordering Public Service to contract with a third-party engineering firm or any other consultant or agency is necessary or warranted. We are persuaded by Public Service's testimony, evidence, and experience that it is capable of creating its own scope of work and detailed design drawings, as necessary, in order to maintain a safe, reliable, and effective system.

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<sup>53</sup> See *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U.S. 379, 387 (1888) ("everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent.")

182. We also decline to order Boulder and Public Service to file the detailed drawings prior to the Go/No-Go Decision later in this Proceeding or as part of a separate future proceeding. Review and consideration of approval of detailed specifications and drawings is well beyond the normal scope of Commission regulation over electric utilities. As stated above, there is no evidence that Public Service will not be able to continue to provide safe, reliable, and effective service post separation in accordance with good utility practice and industry standards in the design, construction, and operation of its system, provided that Boulder meets certain conditions in compliance with this Decision and provided that the designation of assets for transfer is limited to the assets outside the substations, as ordered herein.

**C. Construction of New Facilities and Reconfiguration of Existing Facilities**

**1. Boulder's Proposal**

183. Boulder proposes that Public Service, its third-party contractors, and its consultants, in coordination with the City, construct the facilities necessary to separate the systems, consistent with the design drawing and specifications jointly prepared by Boulder and Public Service as approved by the Commission in Phase 2 of this Proceeding. During the construction phase and up until the Cut-Over Date, Boulder expects that Public Service will test, energize, and use the newly constructed facilities as the operator of the system as parts of the construction are completed.

184. Boulder estimates that the cost of construction and reconfiguration work will be approximately \$73 million.<sup>54</sup> Public Service calculates the cost of the construction and reconfiguration work to be approximately \$107 to \$109 million.<sup>55</sup>

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<sup>54</sup> Hearing Exhibit 101, Bailey Direct at 64.

<sup>55</sup> Public Service SOP at 40.

185. Boulder argues that it is prudent that just one utility operate the integrated facilities until they are separated for safety and reliability reasons. Boulder adds that it “is logical that Public Service would continue to operate the integrated facilities in parallel with managing the design, construction, and reconfiguration required under the Separation Plan.”<sup>56</sup>

186. Boulder argues that requiring Public Service to “take the lead on construction,” while continuing to own and operate the system within Boulder, ensures continued Commission jurisdiction “over the facilities” until the Cut-Over Date. In contrast, Boulder asserts that if the Commission requires Boulder to install and own its own facilities, those facilities would be outside of the Commission’s jurisdiction, because they are assets of a municipal utility for serving customers within City Limits. According to Boulder, a requirement that Boulder complete its own construction work “raises additional concerns and complexities that are avoided” if Public Service is responsible for construction and owns all the assets until the Cut-Over Date.<sup>57</sup>

## **2. Positions of the Intervening Parties**

187. According to Public Service, Boulder is proposing for itself five new distribution substation transformers and five new feeder lines. Public Service states it is unwilling to design, procure, construct, test, and commission Boulder’s facilities and cannot legally be ordered by the Commission to do so. Public Service states that it: “is not in the business of designing, procuring, constructing, testing or commissioning facilities for other utilities. Boulder can hire its own

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<sup>56</sup> Boulder SOP at 62.

<sup>57</sup> *Id.* at 63.

contractors to design and construct its facilities and can obtain (at a cost) from those contractors the protections for cost overruns and delays it seeks to impose on Public Service.”<sup>58</sup>

188. Public Service argues that separation will require a large number of different construction and reconfiguration activities to occur during the same timeframe, necessitating extensive project management and coordination with Boulder to maintain service to existing customers during the process. Public Service states that it also will be dependent on Boulder placing its facilities and being ready to operate them. Public Service states that it will need the flexibility to schedule work and adjust schedules as necessary to respond to conditions on a daily basis. Public Service states that is not willing to function as a general contractor for Boulder. Public Service argues that it needs to be able to make the same decisions on a daily basis that it would make for any of its public utility projects and that it cannot stop and check or negotiate with Boulder every step of the way or take the financial risk.

189. Regarding new facilities that Boulder would own post separation, Public Service argues that there is no reason for Public Service to take on the risk of designing and constructing new facilities for Boulder. Boulder can hire its own contractors to design and construct its facilities and can obtain (at a cost) from those contractors the protections for cost overruns and delays it seeks to impose on Public Service. Public Service also states that there is no reason why Public Service should or can be required to design, procure, construct, test, and commission new Boulder only facilities. Public Service argues that the services which Boulder is requesting Public Service be ordered to provide are not regulated public utility services; rather, they are the services general construction contractors provide under voluntarily negotiated private contracts.

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<sup>58</sup> Public Service SOP at 44.

190. Public Service also takes the position that it is not necessary for Public Service to operate any new substation transformers that Boulder will own in order to serve customers. The Company explains that there is no need for any of the City's new substation facilities to be used by Public Service to provide service and they can be constructed and ready to be placed in service without Public Service having any responsibilities (other than temporarily providing load for testing). Likewise, Public Service states that it is also not necessary for Public Service to integrate Boulder's distribution facilities outside of the substations in order to serve customers before separation.

191. Regarding new facilities that Public Service would own, Public Service states that it has the right to design and construct the new facilities it will own after separation and that, in order for Public Service to be able to continue to serve customers during the construction process, Public Service must be able to decide how separation activities will be undertaken. This includes moving feeders from an existing substation transformer to a new transformer, severing feeders and reconnecting them to other feeders (new or existing), moving customers from one feeder to another, and numerous other activities required to implement the separation.

192. Public Service argues that it cannot be required to use a third party contractor, selected by competitive bidding and hired to also construct Boulder's new facilities, to construct its new facilities and do the separation work. Public Service states, however, that it would be willing to undertake the construction work for its new facilities and the separation activities subject to the Commission's normal prudence review, but not subject to Boulder's proposed "guardrails and limitations."

193. Staff takes the position that Public Service should not perform the services of an engineering, procurement, and construction firm for Boulder, because it cannot be compelled

to engage in such unregulated activities on behalf of Boulder. Instead, Public Service should contract with an electrical distribution construction contractor for construction and reconfiguration of the facilities that will serve Public Service customers, and Boulder should engage an electrical distribution construction contractor for the construction and reconfiguration of facilities that will serve Boulder's customers, at Boulder's own expense.

### 3. Findings and Conclusions

194. We will not hold Public Service responsible for completing all of the construction and reconfiguration work as proposed by Boulder. We agree with Public Service, Staff, and the OCC that Boulder's proposals suffer from jurisdictional infirmities. As we stated above with respect to the completion of the scope of work documents and detailed design drawing, the Commission lacks authority to compel Public Service to enter into the types of arrangements proposed by Boulder.<sup>59</sup> We are not persuaded that ordering Public Service to contract with a particular construction firm or to complete the construction by any specific means is necessary or warranted. Such a directive is, again, well beyond the normal scope of Commission regulation over electric utilities.

195. We further agree with Staff that the Commission should hold Boulder responsible for the construction and reconfiguration of facilities that will serve Boulder's customers, at Boulder's own expense. Likewise, Public Service will be responsible for the construction and reconfiguration of facilities that will serve Public Service's customers; however, Public Service's construction and reconfiguration work will be completed at Boulder's expense.

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<sup>59</sup> See *Arkansas Valley Smelting Co.*, 127 U.S. at 387.

**D. Financing, Proposed Regulatory Asset, and Payment by Boulder****1. Boulder's Proposal**

196. Boulder requests that the Commission order Public Service to track, in a regulatory asset, the costs related to the following: (1) the development of detailed design drawings and specifications, a cost estimate and bid package, and a schedule for the construction and reconfiguration work; (2) the solicitation of bids; and (3) the construction of the facilities, subject to various conditions.

197. Boulder argues that appropriate categories of costs eligible for inclusion in the regulatory asset include direct costs of planning, engineering, construction, materials, transportation, and project management. Examples of costs that would not be appropriate for inclusion in the regulatory asset are litigation expenses, campaigning, ballot initiatives, and community outreach. Boulder argues that it should not pay the Company's litigation costs.

198. Boulder states that the City agrees to pay the costs accounted for in the regulatory asset, with interest accruing at Public Service's weighted average cost of capital, when the systems are fully separated. In the event the Commission rejects the proposed regulatory asset approach for cost recovery from Boulder, the City argues that the determination of an appropriate funding mechanism instead could be an issue to be addressed in Phase 2 of this Proceeding.

199. Boulder ties its proposal for financing the separation work to its proposed means by which the Commission would retain "continued jurisdiction over the detailed design and construction phases of the Separation Plan."<sup>60</sup> Specifically, Boulder wants Public Service "not only continue to own, operate, and maintain the electric distribution system in Boulder,"<sup>61</sup> but

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<sup>60</sup> Boulder SOP at 15.

<sup>61</sup> *Id.*

also to, as the owner of the system, “make certain modifications to its distribution system to effectuate the Separation Plan.”<sup>62</sup> Public Service would pay for this work, tracking its expenditures in a regulatory asset. Then, at the Cut-Over Date, Boulder would acquire the newly constructed facilities from Public Service, paying the amount in the regulatory asset for the Post-Go/No-Go Costs, as well as interest on that amount calculated at Public Service’s weighted average cost of capital.

200. In its SOP, however, Boulder states that, if the Commission does not “allow Boulder to defer payment”<sup>63</sup> of the construction and reconfiguration costs, Boulder should be responsible for the acquisition of any equipment that will be owned by Boulder after the Cut-Over Date and any construction associated with facilities that will be owned by Boulder after the Cut-Over Date. Boulder states that it will finance those costs as it deems appropriate, adding that Boulder has the ability to finance the construction necessary under the Separation Plan, as well as to finance the acquisition of Public Service’s electric distribution assets after the separation construction. Notably, Boulder states: “at this time, given the substantial uncertainties regarding the level of the costs and the timeframe in which costs will be incurred, Boulder cannot and should not be required to commit to the particular manner in which Boulder will finance those costs, whether it be through general obligation bonds, revenue bond, certificates of participation, a combination of any of those or otherwise.”<sup>64</sup>

201. Boulder also states in its SOP that with regard to the Post-Go/No-Go Costs, the Commission should allow Public Service and Boulder to negotiate whether and the extent to

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<sup>62</sup> *Id.* at 15-16.

<sup>63</sup> *Id.* at 17.

<sup>64</sup> *Id.* at 67.

which payment assurances or security should be required. Boulder proposes to report to the Commission in Phase 2 what agreements have been reached on that issue.<sup>65</sup>

202. In the event Boulder does not have sufficient funds to pay Public Service for all of its incurred costs, Boulder anticipates entering into a contract with the Company that would establish the obligation to pay the acquisition costs as well as the actually- and prudently-incurred separation costs on or just before the Cut-Over Date. Such contract would discuss the method of payment and would be consistent with applicable law.<sup>66</sup>

## 2. Positions of the Intervening Parties

203. Public Service argues that it is not legally required to finance any part of the costs required for Boulder to municipalize. Public Service further argues that there is nothing in § 40-5-101, C.R.S., or any other statute which would authorize the Commission to compel Public Service to finance Boulder's municipalization efforts. Public Service further argues that the Commission has no jurisdiction to issue an order requiring Boulder to compensate Public Service for the costs it incurs to complete the separation and construction work Boulder has proposed in its Separation Plan. Public Service states that its capital is for the purpose of serving its customers, not advancing Boulder's municipalization plans.

204. Public Service states that it cannot be required to incur any costs or expenses until legally enforceable arrangements are in place that will ensure repayment without financial risk or the necessity to sue to get paid. According to the Company, any requirements on Public Service require reimbursement arrangements acceptable to Public Service to be in place to cover all costs and expenses.

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<sup>65</sup> *Id.* at 67-68.

<sup>66</sup> Hearing Exhibit 112, Eicchem Rebuttal at 20.

205. Public Service further argues that knowing the terms and conditions of all agreements necessary between Public Service and Boulder is critical to ensuring that all of the costs of Boulder's desire to municipalize are borne by Boulder and not by Public Service and its remaining customers. Public Service also argues that it legally cannot be ordered by the Commission to enter into any of the necessary agreements. Nevertheless, Public Service agrees that the agreements should be subject to Commission approval. Public Service emphasizes that it is the Company's position that it is imperative that before Boulder is allowed to commence a condemnation proceeding and the Commission loses jurisdiction, "the agreements must be presented to and approved by the Commission before the Commission make its determination that the separation plan will result in safe, reliable and effective service."<sup>67</sup>

206. Public Service also raises a concern that Boulder is not proposing any security for the funds it wants Public Service to advance, for either the design or the construction and separation work.

207. Public Service states that it is willing to let Boulder pay for the costs of Public Service's new facilities and the separation costs as the work is done, subject to the parties entering into an acceptable voluntary agreement and the furnishing of adequate security. Public Service explains that provision would have to be made for the Company's invoices to be paid monthly, and the Company must be provided with security for nonpayment. This provision would enable the Company to restore its system to a single system in the event Boulder changes its mind about municipalization after construction and separation activities have begun. Consistent with Public Service's approach, Boulder would have to pay separately for the costs of its own new facilities.

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<sup>67</sup> Public Service SOP, at 141. (Emphasis omitted)

208. Public Service argues that the creation of a regulatory asset account creates no obligation on the part of Public Service to advance funds for Boulder's municipalization and that the tracking of costs separately from the Company's other accounts has nothing to do with who has to pay those costs and when.

209. Staff states that, with respect to financing Boulder's municipalization, the main goal should be to ensure that Public Service's ratepayers do not finance any aspect of municipalization, whether it be during the detailed design phase or during construction work occurring after Boulder's Go/No Go decision.

210. Staff argues that Boulder should be responsible for funding all costs required to design, procure, and construct the new municipal electric utility. Public Service should provide Boulder with a monthly invoice of the municipalization-related expenses that Public Service incurs (which Boulder pays each month). If Boulder disputes any expenses presented by Public Service in the monthly invoices, it must submit those items to the Commission for resolution of the dispute on a quarterly basis. Boulder should fully securitize the estimated cost of construction and reconfiguration work that Public Service will bear, even with the requirement that Boulder submit monthly payments.

### **3. Findings and Conclusions**

211. We reject Boulder's proposal for Public Service to finance the construction and reconfiguration work. As Ms. Atkeson testified, multi-year fiscal obligations of a governmental entity, such as Boulder, are not legally binding and enforceable, without a dedicated revenue stream for repayment.<sup>68</sup> There is too little benefit and too much risk to Public Service's

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<sup>68</sup> Hearing Transcript, August 3, 2017, at 279-282.

ratepayers if Public Service were to finance upfront the construction and reconfiguration work without repayment from Boulder at least five years into the future. Moreover, the record, including the testimony of Mr. Eiche, the Chief Financial Advisor to Boulder,<sup>69</sup> supports a finding that Boulder has alternative means to finance the construction and reconfiguration work required for the separation of Public Service's system.

212. We also agree with Public Service that the Company is not legally required to finance any part of the costs required for Boulder to municipalize, nor do we possess the authority to require Public Service to assume such a financial burden.<sup>70</sup>

213. We agree with Boulder that, because we are not adopting Boulder's approach for financing the work, Boulder must be responsible for the acquisition of any equipment that will be owned by Boulder after the Cut-Over Date and any construction associated with facilities that will be owned by Boulder after the Cut-Over Date. This approach will narrow the issue of cost reimbursement to the new construction and reconfiguration work Public Service completes for providing service to its customers post separation. We further agree with Boulder that the Commission should allow Public Service and Boulder to negotiate whether, and the extent to which, payment assurances or security should be required.

214. As explained above, we have required, as a condition for approval of the designation of assets for transfer *outside* the substations, the filing of an agreement between Boulder and Public Service that addresses the payment by Boulder to Public Service for costs incurred by the Company associated with the development of scope of work documents, detailed

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<sup>69</sup> Hearing Transcript, August 1, 2017, at 205-212.

<sup>70</sup> As Public Service continually points out, it is a regulated public utility and not a lender. It is not legally required to finance any part of the costs required for Boulder to municipalize. There is nothing in the Public Utilities Law—including § 40-5-101, C.R.S. (New Construction – Extension)—authorizing the Commission to require Public Service to finance efforts that will ultimately not benefit Public Service's ratepayers.

design drawings, and specifications associated with the new construction and reconfiguration work costs to effectuate the separation of the systems. This condition on the designation of assets for transfer is essential to protecting Public Service's ratepayers from being ultimately responsible for the costs associated with Boulder's municipalization efforts.

**E. Dispute Resolution**

215. Boulder argues that Public Service fundamentally does not want Boulder to municipalize. Boulder adds that Public Service has little or no incentive to manage costs or keep construction on schedule. Boulder therefore requests that the Commission establish a process, for after the Go/No-Decision and prior to the Cut-Over Date, whereby Boulder or Public Service could raise any issue or dispute that concerns matters within the jurisdiction of the Commission to the Commission or an ALJ. Boulder recommends that the Commission require parties to raise disputes only as needed, but no more frequently than quarterly.<sup>71</sup>

216. Public Service argues that while Boulder has asked the Commission to resolve disputes up to the Cut-Over Date, the Commission may lack jurisdiction if the Phase 1 decision gives Boulder transfer approval under § 40-5-105, C.R.S. Public Service adds that once the Commission has fully exercised its transfer approval authority, it will lose its jurisdiction. Public Service further argues that Boulder cannot create jurisdiction of the Commission by consent.

217. We cannot be sure at this time what disputes will arise between Boulder and Public Service that will require resolution. However, it appears that many disputes would involve contractual claims and disputes over costs and payments. To the extent that Boulder is asking the Commission to hear and resolve such matters, we note that serving as the authority to resolve such disputes would most likely require this Commission to step outside its scope of jurisdiction.

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<sup>71</sup> Boulder SOP at 15.

As has been clearly stated by the Commission previously, while the Commission enjoys broad authority over regulated public utilities, that jurisdiction is nevertheless limited. For example, Administrative Law Judge Mana Jennings-Fader noted that the Commission was aware that its jurisdiction was limited to the extent that it is characterized as a statutory tribunal:

The Commission is not the functional equivalent of a Colorado Constitution article III court, which has general jurisdiction over common law claims and which may award equitable and legal remedies, including monetary damages. *See, e.g. Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 513 (Colo. 1986) (powers of article III courts and of statutory courts). The Colorado Supreme Court has held consistently that the Commission does not possess general jurisdiction, that the Commission may not entertain tort and other common law claims, and that the Commission may not create remedies which are not authorized by statute. Thus, there is a clear point of demarcation between the jurisdiction of the Commission and that of the article III courts.<sup>72</sup> [Footnote 9 omitted]

Nor does the Commission possess the authority to hear claims of negligence, common law breach of contract claims, causation, or to provide redress in the form of monetary damages for claims that are grounded in an alleged violation of Public Utilities Law or a tariff, Commission decision, or of Commission rules. Instead, the question of damages is an issue to be determined in a court of competent jurisdiction in a private cause of action.<sup>73</sup>

218. These findings by the ALJ are buttressed further by case law that holds that “[a]dministrative agencies cannot exceed the authority conferred upon them by statute.”<sup>74</sup> Acts of

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<sup>72</sup> Recommended Decision No. R14-0369, Proceeding No. 13F-0110EG issued April 9, 2014, ¶ 34. Also citing, *IREA v. Colorado Central Power Co.*, 307 P.2d 1101, 1104-05 (Colo. 1957); *PUC v. Manley*, 60 P.2d 913 (Colo. 1936); *People v. Swena*, 296 P. 271, 272 (Colo. 1931) (PUC’s statutory authority not that of an article III court); and *Public Service Company of Colo. V. Van Wyck*, 27 P.3d 377, 384-85 (Colo. 2001); *People ex rel. Hubbard v. PUC*, 178 P. 6, 14-15 (Colo. 1918) (Commission may not create remedies which are not authorized by statute).

<sup>73</sup> *Id.*

<sup>74</sup> *City and County of Denver v. Gibson*, 546 P.2d 974, 975-76 (1975) (internal citations omitted) (overturning Denver Civil Service Commission order to promote a candidate unfairly prejudiced in his examination by the action of his superior, since the Commission had no statutory authority to issue such an order).

administrative agencies that exceed the scope of their delegated powers are void, regardless of the equities involved.<sup>75</sup> Therefore, while the Commission's jurisdiction is broad in the realm of the Public Utilities Law, it is not boundless, and must be tempered according to its statutory strictures, or it runs the risk of acting *ultra vires*.

219. We conclude that it is unnecessary and potentially cumbersome for the Commission to adopt Boulder's proposed dispute resolution process. Boulder's Application contains several requests that the Commission cannot grant due to a lack of subject matter jurisdiction. We also agree with the intervening parties who argue that consent of the parties, express or implied, cannot create subject matter jurisdiction that the Commission is otherwise lacking.<sup>76</sup>

## V. SERVICE TO IBM

### A. IBM's Position

220. IBM claims that the lack of detail in Boulder's Application is a sufficient basis to deny the application in its entirety. IBM offers that if the Commission is not yet prepared to make that determination, it can and should decide the IBM-specific issue, and deny the Application as to IBM. According to IBM, Boulder has not proven that it can adequately operate an electric utility and provide IBM with the reliable service it needs. Thus, the Commission should not approve any separation plan that allows Boulder to serve IBM.<sup>77</sup>

221. IBM Witness Leo Ladaga states: "The data center marketplace is very competitive and near perfect reliability is not an aspiration or goal, it is a non-negotiable commitment."<sup>78</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> IBM SOP at 3.

<sup>78</sup> Hearing Exhibit 500, Ladaga Answer at 14.

Mr. Ladaga states that IBM's customer contract is for 99.9 plus percent "availability" and that ensuring reliability is critical to not only IBM's clients but to the public in general, because of the nature of IBM's services on the Boulder campus.<sup>79</sup> Mr. Ladaga goes on to explain that the Boulder campus houses IBM's Global Technology Services and Resiliency Services, as well as one of two IBM global command centers, multiple call centers, data archival services, and a product literature production facility.<sup>80</sup> IBM's more than 10,500 resiliency services clients range widely in industries that require near-perfect reliability, including 75 percent of the top 35 banks in the world.<sup>81</sup> In the event that IBM fails to meet service levels, it is subject to penalties that can range to millions of dollars.<sup>82</sup>

222. IBM witness Brody Wilson testified that Boulder lacks an operations plan and, even if there are no changes at Substation F, Boulder's distribution utility will not "see into" Public Service's transmission system, and vice versa.<sup>83</sup> IBM witness Eugene Shlatz also testified that the specific shortcomings of Boulder's proposal include Boulder's lack of operational history and experience in operating an electric utility; Boulder's failure to demonstrate that it will have adequate resources to restore the system during outages and emergencies; Boulder's lack of centralized communications and control facilities; and Boulder's lack of trained staff.<sup>84</sup>

223. IBM argues that it is the Commission's duty to assure that future Boulder customers will receive safe, adequate, and reliable service, before it permits the separation of Public Service assets, service territory, and customers for which Boulder seeks Commission

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<sup>79</sup> *Id.* at 2. Mr. Ladaga uses the term "availability" throughout his testimony, but IBM uses the word "reliability" in its SOP.

<sup>80</sup> *Id.* at 6.

<sup>81</sup> *Id.* at 10-11.

<sup>82</sup> *Id.* at 14.

<sup>83</sup> Hearing Transcript, August 7, 2017 at 45.

<sup>84</sup> Hearing Exhibit 503, Shlatz Answer, Attachment ELS-7.

approval. According to IBM, under the Boulder District Court Decision and *City of Fort Morgan v. Pub. Utils. Comm'n*, 159 P.3d 87 (Colo. 2007), the Commission must exercise this duty now, and not after Boulder begins operating its municipal utility and IBM loses service or reliability.<sup>85</sup> IBM asserts that these cases give the Commission the authority to make a determination that Boulder is unwilling or unable to provide substantially adequate service to IBM post-separation, therefore the Commission “must be able to make this same assessment, now, before separation occurs, particularly given that these customers are currently served by Public Service, an entity already possessing a CPCN to serve customers in Boulder.”<sup>86</sup> IBM further argues that, because all of Boulder’s future customers are current Public Service customers, the Commission has a duty to ensure that the creation of a Boulder municipal utility will not harm these customers.

224. IBM believes that the law requires Boulder, at the very least, to make a showing of operational and financial fitness before the Commission can determine whether Boulder’s separation plan will result in safe, effective, and reliable service for all current customers of Public Service, including those who would become future Boulder customers. According to IBM, Boulder has not provided any evidence that it is capable of providing adequate service to IBM when Boulder takes title to Public Service’s assets. IBM asserts that Boulder “failed to address or explain many functions and capabilities that are required to safely and reliability operate an electric utility distribution system.”<sup>87</sup> IBM argues that Boulder has not proven in this Proceeding that it will be able to protect the system’s effectiveness, reliability, and safety, and provide adequate service to IBM under its separation plan. IBM cautions the Commission that Boulder proposes not to provide any meaningful financial or operational detail until after

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<sup>85</sup> IBM SOP at 27-30.

<sup>86</sup> *Id.* at 2. (Emphasis omitted)

<sup>87</sup> *Id.* at 13.

the “Go/No-Go” decision, when the Commission will have less authority (if any) over the municipalization process. IBM therefore asks the Commission to deny Boulder’s application as to IBM. However, recognizing Boulder’s right to create a municipal utility, IBM proposes a compromise: if Boulder receives all necessary approvals to proceed with its municipal utility, IBM proposes that it would not initially be a Boulder customer, or, in other words, the Commission would deny Boulder’s Application specific to IBM. But the Commission also would expressly recognize that Boulder would be allowed to subsequently reapply to add IBM to its service territory, seeking such further separations from the Public Service system as might be necessary, after Boulder had established a track record for providing safe, effective, and reliable service. IBM believes that five years of operational detail is sufficient to establish that track record.

#### **B. Boulder’s Response**

225. Boulder states that it is willing to provide IBM with the same level of service and reliability that IBM receives from Public Service.<sup>88</sup> Boulder has also stated that it will consider not changing Substation F, which would obviate IBM’s concerns about power losses during construction.<sup>89</sup>

226. Boulder asserts that it has a constitutional right to serve IBM because IBM is located entirely within Boulder’s municipal boundaries. According to Boulder, after it begins operating its municipal utility, the Commission may consider whether it is able to provide adequate service to any of Boulder’s customers—not before. Boulder notes that in the *Fort Morgan* case, the City had the opportunity to provide utility service before the Commission

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<sup>88</sup> Boulder SOP at 80.

<sup>89</sup> *Id.* at 12.

determined that the service was inadequate. Boulder further argues that it has demonstrated that the Separation Plan would result in a reliable, effective, and safe system that would be capable of serving IBM's needs, and that the Separation Plan will provide equal or greater capacity and voltage and increased redundancy and reliability for IBM. Boulder also states that it has specifically modified the Separation Plan to meet IBM's needs and address IBM's concerns. Finally, according to Boulder, IBM's request for special treatment is not lawful under the doctrine of regulated monopoly.

### C. Positions of Other Parties

227. According to Public Service, if Boulder is permitted to serve IBM, and the Commission determines later that Boulder's service is not adequate for IBM, Public Service cannot resume provision of service to IBM without building a new substation. Public Service states that it cannot be a "backstop" for Boulder because it will not have the facilities necessary to serve customers in Boulder. Public Service argues that "[i]t follows from the rationale and holding of *Fort Morgan* that until a municipal utility is able to provide adequate service, the status quo with the existing utility must be maintained."<sup>90</sup> Accordingly, Public Service opines that IBM's compromise proposal—for a five-year waiting period to allow Boulder to develop a track record of reliable service before Boulder can serve IBM—is reasonable.

228. Staff generally agrees with Boulder that it is premature for the Commission to make a decision about whether Boulder is willing and able to provide reliable service to IBM under *Fort Morgan*. According to Staff, the Commission does not yet possess adequate information to evaluate concerns related to Boulder's operational viability. Additionally, Staff notes that in *Fort Morgan*, a public utility had applied for a CPCN to serve the customers inside

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<sup>90</sup> Public Service SOP at 64. (Emphasis in original)

Fort Morgan's municipal boundaries, but no utility has sought such permission yet. Staff concludes that the possibility that Boulder is unable to serve the customers within its planned service area adequately is too theoretical to review at this time.

229. Staff recommends that the Commission reject IBM's proposal that would allow Public Service to continue to serve IBM for five years until Boulder can prove that it can provide reliable electric service to IBM. Although Staff acknowledges that IBM requires a reliable source of electricity for its Boulder-based data center operations, Staff notes that there are also other Boulder-based business customers that cannot afford electric power outages either, such as hospitals. Staff warns that structuring the municipalization of Boulder's electric utility so that IBM receives special treatment poses both legal challenges and questions of fundamental fairness to other electric customers. However, Staff suggests that the Commission reserve its ability to consider Boulder's operational capability before a transfer of assets to Boulder occurs.

#### **D. Legal Analysis**

230. A municipal utility cannot be prohibited from serving customers located in its municipal boundaries, unless it is unwilling or unable to provide substantially adequate service to the customer or area.<sup>91</sup> In this way, municipal utilities are treated the same under the law as public utilities; they have the same right to continue providing service in their service territories unless it is shown that they are unwilling or unable to provide substantially adequate service.<sup>92</sup> In

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<sup>91</sup> *Fort Morgan v. Pub. Utils. Comm'n*, 159 P.3d 87 (Colo. 2007).

<sup>92</sup> See, e.g., *Durango Transp., Inc. v. Pub. Utils. Comm'n*, 122 P.3d 244 (Colo. 2005); *RAM Broadcasting of Colo., Inc. v. Pub. Utils. Comm'n*, 702 P.2d 746 (Colo. 1985); *Pub. Serv. Co. v. Pub. Utils. Comm'n*, 485 P.2d 123 (Colo. 1971); *Pub. Serv. Co. v. Pub. Utils. Comm'n*, 483 P.2d 1337 (Colo. 1971); *Fountain v. Pub. Utils. Comm'n*, 447 P.2d 527 (Colo. 1968). *Southeast Colo. Power Ass'n v. Pub. Utils. Comm'n*, 428 P.2d 939 (Colo. 1967); *Ephraim Freightways, Inc. v. Pub. Utils. Comm'n*, 380 P.2d 228 (Colo. 1963) (cases upholding the principle that a public electric utility in Colorado has the exclusive right to serve all customers inside its certificated service territory, unless the public utility is unwilling or unable to provide substantially adequate service to the customer or area).

all of the cases upholding the principle that a public electric utility in Colorado has the exclusive right to serve all customers inside its certificated service territory, unless the public utility is unwilling or unable to provide substantially adequate service to the customer or area, the applicant seeking to serve a customer or area inside the service territory of a certificated public utility or of a municipal utility had the burden to prove that the service currently provided was not substantially adequate.

231. A municipal electric utility, however, is not jurisdictional to the Commission when it is serving only customers inside its municipal boundaries.<sup>93</sup> Unlike a public utility that is under the Commission's jurisdiction, a municipal utility does not need to prove that the public convenience and necessity requires the provision of service before it can serve its customers.<sup>94</sup> Under *Fort Morgan* and the doctrine of regulated monopoly, Boulder has the right to serve IBM because IBM is located within Boulder's municipal boundaries.

232. Under *Colorado Const.* art XXV, the Commission has very limited jurisdiction to allow a public utility to provide service inside the boundaries of a municipal utility. However, the *Fort Morgan* court held that, the Commission has the authority to ensure adequate service to all utility customers, regardless of whether the customer is being serviced by a regulated public utility or not.<sup>95</sup>

233. In *Fort Morgan*, the Colorado Supreme Court stated that the Colorado Constitution strikes a balance between local government authority over a municipal utility and

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<sup>93</sup> *Colo. Const.* art. V, § 35, and art. XXV; § 40-1-103(1)(b)(II), C.R.S. (exempting municipal utilities from the definition of public utility); § 40-3-101(1), C.R.S. (exempting municipal utilities from rate regulation by the Commission).

<sup>94</sup> See *Fort Morgan*, 159 P.3d at 94 (stating that the Commission cannot require a municipal utility to obtain a CPCN when it is operating within its municipal boundaries).

<sup>95</sup> *Fort Morgan*, 159 P.3d at 95-97.

the Commission's authority to ensure adequate electric service across Colorado.<sup>96</sup> The court further held that the Commission has the authority to determine whether a municipal utility is unwilling or unable to provide substantially adequate service inside its municipal boundaries, even though the Commission does not have jurisdiction over the services, facilities, and rates of municipal utilities.<sup>97</sup> Fort Morgan's tariff only allowed for interruptible service but the customers needed firm service for their food processing businesses.<sup>98</sup> The court upheld the Commission's decision that interruptible service was inadequate service, and thus allowed a different public utility to serve those customers.<sup>99</sup>

234. In contrast to *Fort Morgan*, where the customer at issue was inside the municipal boundaries, in *Fountain*, the municipal utility had a certificated service territory outside of its municipal boundaries.<sup>100</sup> The Commission's jurisdiction over Fountain's provision of service in its certificated service territory was the same as the Commission's jurisdiction over a public utility.<sup>101</sup> The *Fountain* Court upheld the Commission's decision that Fountain had inadequately served part of its service territory because it could not economically provide service to customers in the far eastern part of its service territory and prices were so high that it was "tantamount to denial of service."<sup>102</sup>

235. These are the tests the Commission must apply if all or part of a public utility's CPCN—or a municipal utility's right to serve—is to be taken away.

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<sup>96</sup> *Fort Morgan*, 159 P.3d at 95-97.

<sup>97</sup> *Id.* at 97.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Fountain*, 447 P.2d at 528.

<sup>101</sup> *See Pub. Utils. Comm'n v. Loveland*, 289 P. 1090, 1094 (Colo. 1930 ("When the city became a public utility under the statute, it had no superior right as to territory outside of its municipal boundaries over the rights of any other public utility, private corporation or otherwise, authorized to furnish service.")).

<sup>102</sup> *Fountain*, 447 P.2d at 530-31.

**E. Findings and Conclusions**

236. We conclude that there is insufficient evidence in the record for the Commission to conclude **at this time** that Boulder is unwilling or unable to provide substantially adequate service to IBM. In both *Fort Morgan* and *Fountain*, the municipal utilities had the opportunity to provide service before the Commission determined that the service was inadequate. Boulder currently is not in a position to serve any customers as a municipal electric utility, so it is premature for the Commission to enter a finding on whether Boulder is willing and able to adequately serve IBM under the *Fort Morgan* case. We find that IBM's specific operational and financial concerns can be addressed as Boulder and Public Service develop the plans for substation configurations and as Boulder continues to create the operations plan for its municipal utility.

237. Further, because we have elected not to approve Boulder's proposed Separation Plan, it is not necessary to find that the Separation Plan will result in substantially adequate service to IBM. However, IBM is not precluded from bringing additional evidence to the Commission at a later time—based on Boulder's future operations plan—that it believes demonstrates that Boulder is unable to provide adequate service to IBM.

238. Boulder and Public Service (and IBM and/or Tri-State, if necessary) have shared interests in working cooperatively towards resolving the detailed design, siting, and construction issues associated with providing electric service to IBM under the new Boulder municipal utility. A mutual resolution should minimize construction-related disruptions to IBM's electric service.

239. While we agree with Staff regarding the need for fairness in the treatment of all customers, IBM has a unique service quality arrangement negotiated with Public Service. Furthermore, IBM has put forth a substantial effort in this Proceeding to articulate the magnitude

and severity of its concerns regarding the continued delivery of safe, reliable, and effective service during and after the proposed municipalization of electric service. The Commission noted, during deliberations, that while Boulder has a responsibility to provide safe, reliable, and effective service to its residential customers, Boulder also has large customers that are economic drivers for the state as whole. Thus, the Commission calls upon Boulder to pay particular heed to IBM's concerns and make all reasonable efforts to engage, not only IBM, but also the other customers that Boulder intends to serve.

## **VI. DIRECTIVES TO PUBLIC SERVICE**

### **A. Good Faith Cooperation with Boulder**

240. Public Service witness David Eves states that Public Service acknowledges that Boulder has a right under the Colorado Constitution, subject to certain property owner protections and conditions, to acquire Public Service's facilities in order to form a municipal utility. Mr. Eves also states that Public Service would prefer that Boulder ultimately opt not to pursue the path of forming a municipal utility. However, given the possibility that Boulder may create a municipal electric utility, Mr. Eves states that Public Service's "sole interest in this case is that the proper separation be planned and implemented correctly to ensure the safety, reliability and effectiveness of [Public Service's] system and in a manner that gives the Commission proper oversight consistent with the Colorado Public Utilities Law."<sup>103</sup>

241. According to Mr. Eves, the end state of the municipalization process: "should be a reconfigured system where, on the date Boulder takes possession, [Public Service] can open and close breakers and Boulder will have a fully operational distribution system. This process will require work on our system both inside and outside of Boulder to preserve [Public Service's]

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<sup>103</sup> Hearing Exhibit 200, Eves Answer at 8.

present level of reliability for our remaining customers, but I believe Boulder customers will benefit as well.”<sup>104</sup>

242. At hearing, Mr. Eves explained that Public Service has submitted significant amounts of testimony, with suggestions, information, and alternatives to Boulder’s proposal, such that the Company could “continue to work on those things to help Boulder find solutions and negotiate with us to create the best plan.”<sup>105</sup> He also committed Public Service to working in good faith with Boulder to address real property descriptions that Public Service argues are necessary to include in the identification of the assets for transfer.<sup>106</sup>

243. Mr. Eves also testified that Boulder and Public Service have reached a point where, regardless of whether the Commission denies the Application, the issues raised in this Proceeding could be resolved through “good fair work” and negotiations.<sup>107</sup> Mr. Eves stated that he is prepared to commit Public Service to work with Boulder now that it is engaged in advancing a plan that is “closer to being doable and right” and that if municipalization is going to happen, Public Service “want[s] to make sure that it is properly done, our customers are not affected and that we get compensated for it.”<sup>108</sup>

244. We intend to hold Public Service to the commitments made by Mr. Eves. We expect Public Service to work in good faith with Boulder to assist the City in being able to satisfy the three conditions for Boulder to secure final approval of the designation of assets for transfer outside of the substations. We further expect Public Service to work with Boulder

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<sup>104</sup> *Id.* at 9.

<sup>105</sup> Hearing Transcript, August 2, 2017 at 53.

<sup>106</sup> *Id.* at 117.

<sup>107</sup> *Id.* at 33-34.

<sup>108</sup> *Id.* at 125.

pursuant to the transmission load interconnection process under the Company's OATT to resolve the issues surrounding the six substations. Public Service's cooperation is critical to avoiding unnecessary delay in Boulder's attempts to comply with the conditions set forth in this Decision. Delay will not advance Public Service's ability to provide safe and reliable service to its customers post-separation.

**B. Obligation to Serve Until Cut-Over**

245. Boulder requests that the Commission order Public Service to continue to own, possess, operate, maintain, and improve the electric distribution system in Boulder until the Cut-Over Date.<sup>109</sup>

246. At hearing, Mr. Eves confirmed that Public Service will continue to operate its system to serve customers in Boulder during the construction and separation time period and agreed that Public Service will endeavor to provide the same level of safe, effective, and reliable service that it does today during the construction and separation.<sup>110</sup>

247. We find that it is undisputed among the parties that Public Service is obligated to serve customers in Boulder until the Cut-Over Date. Boulder's request is hereby granted.

**C. Cost Accounting**

248. The OCC contends that non-Boulder Public Service ratepayers should suffer no harm as to costs, or, in other words, no rate increases directly or indirectly from Boulder's municipalization efforts. Along these lines, the OCC takes the position that litigation costs incurred by Public Service with regard to Boulder's municipalization efforts should be a cost paid by Boulder and not passed on to ratepayers.

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<sup>109</sup> Application, 13.

<sup>110</sup> Hearing Transcript, August 2, 2017 at 61-62.

249. CU-Boulder requests that the Commission order that Boulder only pay prudently- and actually-incurred costs of construction and separation, which order should be implemented through a transparent, fair, and periodic Commission-administered process which is largely consistent with Boulder's positions in this case.

250. Climax argues that the Commission should prevent Public Service's customers outside Boulder City Limits from bearing any costs resulting from the City's efforts to create a municipal electric utility, whether those costs have already been incurred or will be incurred before or after the City's Go/No-Go decision. Climax states that none of the costs incurred by the City or the Company as a result of the City's efforts to municipalize, whether the City is successful or not, have been or will be caused by the "remaining customers." Climax states that rates recovering costs that are not caused by, for the benefit of, or necessary to provide adequate, reliable, and effective service to the remaining customers are not just and reasonable.

251. Evraz similarly requests that the Commission issue an order precluding Public Service from passing any costs of municipalization through to ratepayers remaining on the Company system. Evraz is concerned that the protracted dispute between Public Service and Boulder will lead to increased rates for Public Service customers. Evraz thus requests that the Commission, as part of its order in this Proceeding, require that Public Service pass no costs related to municipalization on to its customers.

252. Staff states that the main goal for the Commission should be to ensure that Public Service's ratepayers do not finance any aspect of Boulder's municipalization, whether during the detailed design phase or during the construction work after Boulder's Go/No Go decision.

253. At hearing, Public Service witness Eves suggested that an order from the Commission was necessary for the Company to begin keeping track of its direct and indirect costs associated with Boulder's municipalization efforts.<sup>111</sup>

254. We direct Public Service to account for the costs it incurs associated with Boulder's municipalization efforts for purpose of review in future rate cases by the Commission, Staff, and all other parties to those proceedings. The record in this Proceeding is devoid of any information regarding the amount of costs Public Service has incurred to date, either in total or by cost category. Decisions on what costs may or may not be included in Public Service's revenue requirements for establishing rates shall be made in the Company's future rate proceedings. Any decision on the allocation of costs and benefits between Public Service's shareholders and customers must be deferred until after Boulder and Public Service file for final approval of the transfer of assets pursuant to § 40-5-105, C.R.S.

## **VII. PROCEEDINGS BEFORE THE COMMISSION**

255. Boulder's proposed phasing of this Proceeding is denied. This Proceeding will continue in order to address Boulder's and Public Service's compliance with the conditions and directives rendered in this Decision.

256. In the event that construction is required at a substation to be owned by Public Service, Public Service shall file for a Commission determination of whether the proposal is in the ordinary course or instead requires a CPCN application pursuant to Rule 4 CCR 723-3-3206.

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<sup>111</sup> Hearing Transcript, August 2, 2017 at 153.

257. As explained above, it also may be necessary for Public Service and Boulder to file jointly for approval of a voluntary transfer of assets *inside* substations under § 40-5-105, C.R.S.

258. Boulder and Public Service shall file, pursuant to § 40-5-105, C.R.S., an application in a separate proceeding for the final Commission approval of the transfer of assets prior to the Cut-Over date. This Decision shall not be used by either party as a preliminary approval of the transfer of assets. Nothing in this Decision shall be used by either party in any condemnation proceeding as a finding or opinion of the Commission as to whether or not there are damages to any remainder interest of Public Service in the assets.

### **VIII. ORDER**

#### **A. It is Ordered That:**

1. The Third Supplemental Verified Application (Application) filed by the City of Boulder (Boulder) on May 12, 2017 is granted, in part and with conditions, and denied, in part, consistent with the discussion above.

2. The designation of assets for transfer outside of the six substations at issue in this Proceeding is approved, subject to Boulder satisfying three conditions. To secure final approval of the designation of these assets for transfer, Boulder shall: (1) file an agreement(s) reached between Boulder and Public Service Company of Colorado (Public Service) that provides Public Service permanent non-exclusive easements and other necessary real property rights for the location of Public Service's electric facilities within Boulder's city limits that are necessary for Public Service to provide service to its customers after separation; (2) correct the errors and omissions from the list of assets for transfer outside of the substations and resubmit the revised list of assets for final approval; and (3) file an agreement (or multiple agreements) between

Boulder and Public Service that address(es) the payment by Boulder to Public Service of the costs incurred by Public Service to effectuate the separation of the systems. The filing of the agreements and revised list of assets for transfer shall be made no later than 90 days from the effective date of this Decision. Boulder may file a request for additional time for good cause shown.

3. Any party in this Proceeding may file a request for hearing on all or parts of the filings submitted by Boulder in accordance with this Decision no later than 30 days after Boulder's filing being submitted. In the event that a party requests a hearing on Boulder's filing, the matter will be referred to an Administrative Law Judge for a recommended decision on whether Boulder has satisfactorily met the conditions and whether the Commission approves the assets for transfer outside the substations.

4. Consistent with the discussion above, Public Service is directed to assist Boulder in good faith in Boulder's efforts to satisfy the conditions set forth in this Decision for securing the final approval of the designation of assets for transfer outside of the substations.

5. Public Service shall work with Boulder in good faith pursuant to the transmission load interconnection process under its Open Access Transmission Tariff, consistent with the discussion above.

6. Public Service shall account for the costs it incurs associated with Boulder's municipalization efforts for purpose of review in future rate cases, consistent with the discussion above.

7. Boulder and Public Service shall file, pursuant to § 40-5-105, C.R.S., an application in a separate proceeding for the final Commission approval of the transfer of assets

prior to Boulder beginning operations as a municipal electric utility, consistent with the discussion above.

8. All requests made by Boulder or any intervening party in this Proceeding that is not addressed by this Decision are denied.

9. The 20-day time period provided pursuant to § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

10. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING  
August 30, 2017.**

( S E A L )



ATTEST: A TRUE COPY

Doug Dean,  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

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FRANCES A. KONCILJA

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WENDY M. MOSER

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Commissioners